Supreme Court, U. S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

76-1346

LORILLARD, A DIVISION OF
LOEW'S THEATRES, INC.,
Petitioner,

v.

FRANCES P. PONS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Lorillard, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on 2 February 1977.

OPINIONS BELOW

The opinion of the Court of Appeals decided 2 February 1977 (App., infra, pp. 2a - 7a) is not yet reported. The Memorandum of the District Court entered 21 January 1976, 69 F.R.D. 576, 13 FEP Cases 444, appear in the Appendix (pp.7a-12a).

JURISDICTION

The judgment of the Court of Appeals was entered on 2 February 1977 (Appendix, p. 1a). This petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether the Seventh Amendment, or the Age Discrimination in Employment Act (29 U. S. C. 626), requires a jury trial upon demand of one of the parties in an action for injunctive relief and back wages under that Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

29 U. S. C. 626(b) and (c) provide in pertinent part:

> (b) . . . In any action brought to enforce this (Act) the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this (Act), including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. . . .
>
> (c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: . . .

STATEMENT OF THE CASE

This action under the Age Discrimination in Employment Act was commenced by respondent herein, a former female employee of Lorillard, who alleged in her complaint that when she was 48 years of age, on 31 January 1975, she was terminated by her employer as a part of its policy to discharge older employees and to retain young people as employees wherever possible. Respondent sought injunctive reinstatement, monetary damages consisting of lost wages from date of discharge to date of judgment, together with an equal amount of liquidated damages, costs and attorney's fees.

Respondent demanded trial by jury on all issues of fact. Petitioner's motion to strike respondent's demand for a jury trial was sustained by the District Court, it ruling that actions for lost wages

under Title VII of the Civil Rights Act of 1964, and the Courts of Appeals that have ruled on the subject, have universally denied a jury trial in such actions (App., p. 8a). An interlocutory appeal of the District Court order to the Court of Appeals was allowed. 28 U. S. C. 1292(b); FRAP 5.

The order of the District Court striking petitioner's demand for a jury trial was vacated by the Court of Appeals on the ground that the inclusion of the phrase "legal . . . relief" in 29 U. S. C. 626(b) and (c) empowers a federal court to grant parties in ADEA actions a Constitutional and statutory right to a jury trial. Accordingly, the claim for back pay was remanded for trial by a jury. (App., pp. 6a).

REASONS FOR GRANTING THE WRIT

1. The decision below conflicts with the decision of the Court of Appeals for the Sixth Circuit as to the proper interpretation of the Seventh Amendment and 29 U. S. C. 626(b) and (c)

The Fourth Circuit has here held that the relief sought in an ADEA action constitutes a suit "at common law" as embodied in the Seventh Amendment, and that the Age Act by its terms excludes the non-jury concept and commands the impanelment of a jury, if requested, in claims for lost wages.

In so holding, the Fourth Circuit conceded that its interpretation of the Seventh Amendment and 29 U. S. C. 626(b) and (c) conflicts with that adopted by the Sixth Circuit in *Morelock v. NCR Corp.*, 546 F.2d 682 (decided 20 December 1976). (See App., pp. 12a-19a).

In *Morelock*, the action instituted pursuant to ADEA was tried by a jury, with a verdict being returned in favor of the plaintiff; upon motion by defendant, the district court granted a judgment notwithstanding the verdict and a conditional new trial in favor of defendant. On appeal, the Sixth Circuit read the ADEA to be an offspring of Title VII, noting that the prohibitions of the two Acts are virtually identical in terms. Accordingly, that Court held that the monetary issues to be tried in the case were equitable in nature just as in Title VII actions and were not suitable for trial by jury, and further held that no constitutional right to a jury trial existed in the action.

The Fourth Circuit herein makes no attempt to differentiate the conclusion that it reached from that reached by the Sixth Circuit in *Morelock*.

This direct conflict between the decisions of the Fourth and the Sixth Circuits is of continuing importance and plainly justifies the grant of certiorari to review the judgment below and resolve the conflict.

2. The decision below raises important and recurring problems concerning the proper interpretation of 29 U. S. C. 626(b) and (c) which have not been settled by this Court

The Fourth Circuit's opinion in this case reflects important constitutional, statutory and policy considerations growing out of efforts to demand jury trials in employment discrimination cases. And, particularly since this Court has not had occasion to address itself to this matter since the prohibition of race, color, religious and notional original discrimination embodied in Title VII of the 1964 Civil Rights Act, and the prohibition of age discrimination embodied in the Age Discrimination in Employment Act of 1967, were enacted into law, there are compelling reasons why some definitive guidelines in the application of 29 U. S. C. 626(b) and (c) should now be marked by this Court.

Curtis v. Loether, 415 U. S. 189 (1974), involved a construction of Title VIII of the Civil Rights Act of 1968, 42 U. S. C. 3612, the fair housing provisions of the Act, and the Court stated:

> . . . A comparison of Title VIII with Title VII of the Civil Rights Act of 1964, where the Courts of Appeals have held that jury trial is not required in an action for reinstatement and backpay, is instructive, although we of course express no view on the jury trial issue in that context. In Title VII cases the Courts of Appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution. . . . (415 U. S. at 196-7)

In *Albemarle Paper Co. v. Moody*, 422 U. S. 405 (1975), a Title VII action, it was noted:

> To the extent, then, that the district court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equittable, and under our cases neither party may demand a jury trial. (422 U. S. at 443) (Rehnquist, J., concurring)

Similarly, a jury trial has been denied in an action for back pay under 42 U. S. C. 1983. *Harkless v. Sweeney Independent School Dist.*, 427 F. 2d 319 (5th Cir. 1970), cert. denied 400 U. S. 991 (1971), and in an action for back pay and punitive damages under 42 U. S. C. 1981. *Lynch v. Pan American World Airways*, 475 F.2d 764 (5th Cir. 1973).

See generally Developments in the Law - Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1266 (1971).

Efforts to demand jury trials in ADEA actions are of common, if not increasing, occurrences and both litigants and lower courts urgently need the assistance of this Court in understanding the policies and the language of the employment anti-discrimination acts, including 29 U. S. C. 626(b) and (c).

This case presents an issue posed by numerous similar discrimination cases throughout the nation which are pending at the trial level. There are seven ADEA actions pending in the Middle District of North Carolina that await a determination of the jury trial issue posed by this Petition.

The Secretary of Labor reported in January 1976 that "since June 12, 1968, the effective date of the Age Discrimination in Employment Act, the Department of Labor has instituted over 255 court actions," including the institution of 30 suits in calendar year 1975.[1]

The total number[2] of employment discrimination actions of all types that were filed in the District Courts during the last four years are:

Fiscal Year of	No.
1973	1,787
1974	2,472
1975	3,931
1976	5,321

If jury trials are entitled to be granted at the request of either party to these actions, a very substantial additional workload will be imposed upon District Courts within the Fourth Circuit.

Furthermore, it is doubtful that an ADEA trial is within the capabilities of a jury — at least experience has proven that such trials often result in judicial time wasted endeavors. For example, see *LaRue v. General Tel. Co. of Southwest*, 545 F. 2d 546 (5th Cir. 1977), where the ADEA action was tried before a jury and after

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[1] Report of Secretary of Labor to Congress pursuant to Section 13 of the ADEA, January 30, 1976, page 12.

[2] Information furnished by the Director of the Administrative Office of the United States Courts. The actions are not coded as to Acts involved.

plaintiff had presented his evidence and rested, the Court granted defendant's motion for an instructed verdict based upon a finding that plaintiff had failed to give notice to the Secretary of Labor of his intent to file a private suit within 180 days of the alleged unlawful practice as required by 29 U. S. C. 626(d). *Morelock v. NCR Corp., supra,* was tried to a jury, but upon motion by defendant, the District Court granted a judgment notwithstanding the verdict end awarded a conditional new trial in favor of NCR. *Laugesen v. Anaconda* Co., 510 F. 2nd 307 (6th Cir. 1975), involved an action by plaintiff claiming he was unlawfully discharged because of his age in violation of ADEA, and was tried before a jury without objection, but the Court of Appeals reversed and remanded for a new trial because of error in instructions to the jury.

It is, therefore, of widespread public importance that the Court consider the issue here presented so that the lower courts may be guided authoritatively with respect to the constitutional and statutory rights for jury trials in employment discrimination actions.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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March 13, 1977

APPENDIX A

JUDGMENT

UNITED STATES COURT OF APPEALS

for the

Fourth Circuit

No. 76-1369

Frances P. Pons,

Appellant,

v.

Lorillard, A Division of
Loew's Theatres, Inc.,

Appellee.

Appeal from *the United States District Court for the* MIDDLE District of NORTH CAROLINA.

This cause *came on to be heard on the record from the United District Court for the* MIDDLE *District of* NORTH CAROLINA, *and was argued by counsel.*

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby,* vacated. The case is remanded to the United States District Court for the district of North Carolina, at Greensboro, for further proceedings consistent with the opinion of the Court filed herewith.

WILLIAM K. SLATE II
Clerk

FILED
Feb. 2, 1977

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 76-1369

Frances P. Pons,

Appellant,

v.

Lorillard, A Division of
Loew's Theatres, Inc.,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

(Argued November 9, 1976 Decided February 2, 1977)

Before Bryan, Senior Circuit Judge, and Butzner and Russell, Circuit Judges.

Norman B. Smith (Smith, Patterson, Follin, Curtis & James on brief) for Appellant; Thornton H. Brooks (M. Daniel McGinn, Brooks, Pierce, McLendon, Humphrey & Leonard on brief) for Appellee.

Albert V. Bryan, Senior Circuit Judge:

Alleging violation of her rights under the Age Discrimination in Employment Act of 1967, 29 U. S. C. 621-634 (1970), appellant Frances P. Pons sued her employer, Lorillard, a Division of Loew's Theatres, Inc.,[1] for injunctive reinstatement, lost wages, liquidated and punitive[2] damages, costs and attorney's fees.[3] Lorillard's motion to strike Pons' demand for a jury trial on the issue of lost wages was sustained by the District Court and an interlocutory appeal of the order was allowed. 28 USC 1292(b); FRAP. 5.

[1] Plaintiff at the age of 48 years was discharged on January 31, 1975; she alleges it was pursuant to a policy of employing younger persons. Lorrillard is a foreign corporation doing business in North Carolina.

[2] On October 18, 1976 Pons moved this court to allow amendment of her complaint to include a prayer for punitive damages.

[3] This appeal involves only the right to a jury trial on the claim of lost wages. The District Judge's opinion notes that the plaintiff "conceded that the liquidated damages issue would not be triable to a jury". Nor are costs, attorney's fees nor, as explained infra, punitive damages before the court. Of course no injunctive relief is now considered.

Our task is to determine whether the Seventh Amendment provision for trial by jury "(i)n suits at common law, where the value in controversy shall exceed twenty dollars" applies to a claim under the Age Act for lost wages.[4] Analysis of the problem begins with the language of the Congress. In relevant part, sections 7(b) and 7(c) of the Act, 29 USC 626(b), (c) state:

> "(b) . . . In any action brought to enforce this (Act) the court shall have jurisdiction to grant such *legal* or equitable *relief* as may be appropriate to effectuate the purposes of this (Act), including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.
>
> "(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such *legal* or equitable *relief* as will effectuate the purposes of this chapter: . . ." (Emphasis added).

Our holding is that the inclusion of the phrase "legal . . . relief" empowers a Federal court to grant complainants the Constitutional right to a jury.

I.

At the outset, we are urged to hold that Age Act complaints should follow the pattern of denial thus far adopted in enforcing the provisions against employment discrimination contained in Title VII of the Civil Rights Act of 1964, 42 UNC 2000e-5. We decline.

Design for decision on this issue is to be found in Curtis v. Loether, 415 US 189 (1974), declaring the availability of a jury in a civil action under Title VIII, section 812(c) of the Civil Rights Act of 1968, 42 USC 3601, 3612 relating to fair housing. This section, as relevant, defines the powers of the court:

> "(c) The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff: . . ."

[4] The question has been discussed and resolved in favor of trial by a jury: Chilton v. National Cash Register Co., 370 FS 660 (SDOhio 1974); Cleverly v. Western Electric Co., 69 FRD 348 (WDMo. 1975); and Murphy v. American Motor Sales Corp., 410 FS 1403 (NDGa. 1976). A list of cases implicitly settling the point is to be found in Murphy v. American Motors Sales Corp., supra, at 1402.

In *Curtis* the Court contrasts Title VII — fair employment — and Title VIII — fair housing — enforcement clauses, concluding that the decisions[5] rejecting a jury trial in Title VII are not construing remedial provisions like those in VIII. 415 US at 196. To repeat, the Court quite cautionsly disavows any interpretation of VII, saying only that its language is not the same as that of VIII. Its distinguishment of the phrasing warrants a lengthy quotation:

> "In Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution. But the statutory language on which this characterization is based —
>
> > '(T)he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate,' . . . — contrasts sharply with § 812's simple authorization of an action for actual and punitive damages. In Title VII cases, also, the courts have relied on the fact that the decision whether to award backpay is committed to the discretion of the trial judge. There is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." (Citation omitted.)

Id. at 196.

Equivalent differentiation is apparent between the Title VII remedies and those of the Age Act. Comparing the two as they have just now been set forth, it is seen at once that the Age Act includes

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[5] See Curtis v. Loether, 415 US at 196-97 n. 13, citing Johnson v. Georgia Highway Express, Inc., 417 F2d 1122, 1125 (5 Cir. 1969); Robinson v. Lorillard Corp., 444 F2d 791, 802 (4 Cir.), cert. dismissed under Rule 60, 404 US 1006 (1971); cf. McFerren v. County Board of Education, 455 F2d 199, 202-04 (6 Cir. 1972); Harkless v. Sweeney Independent School District, 427 F2d 319 (5 Cir. 1970), cert. denied, 400 US 991 (1971); Smith v. Hampton Training School, 360 F2d 577, 581 n. 8 (4 Cir. 1966) (en banc); see generally Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1265-66 (1971). To this list of the Court may be added Cox v. Babcock & Wilcox Co., 471 F2d 13 (4 Cir. 1972).

the terminology of a law action, traditionally calling for a jury verdict, rather than only a suit in equity to be decided and decreed by a chancellor. Thus it comprises the power to grant legal relief, that is relief at law — obviously a suit "at common law" embodied in the Seventh Amendment.

II.

The Age Act by its very terms excludes the non-jury concept and commands the impanelment of a jury, if requested, in claims for lost wages. Forthright to prove this view is the incorporation of related provisions of the Fair Labor Standards Act into the enforcement section of the Age Act, 29 USC 626(b), as follows:

> "The provisions of this (Act) shall be enforced in accordance with the powers, remedies, and procedures provided in sections . . . 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) (supra) of this section . . . . Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: . . . "

The Fair Labor Standards Act provision, 29 USC 216 (except subsection (a)), supra, stipulates:

> "(b) Any employer who violates the provisions of section 206 (minimum wages) or section 207 (maximum hours) of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

Thus the Age Act clearly equates lost wages as "unpaid minimum wages or unpaid overtime compensation" under the FLSA. It is settled that section 216(b) claims are legal in nature and uniformly accorded a jury trial. McClanahan v. Mathers, 440 F2d 320 (6 Cir. 1971); Chilton v. National Cash Register Co., 370 FS at 664 and cases cited.

The ultimate analysis to determine whether a suit is one "at common law" within the Amendment seems to be the three-pronged classical test: (1) Is the issue legal rather than equitable under the custom of the courts of law; (2) Is the remedy legal; and (3) Is the issue triable to a jury given the jurors' practical abilities and limi-

tations? Ross v. Bernhard, 396 US 531, 538 fn. 10 (1970); see 5 Moore's Federal Practice § 38.16 (4) pp. 162.6-8. Where issues of law and equity are intertwined in one suit, those meeting the three-pronged test merit a trial by jury.[6] Dairy Queen, Inc. v. Wood, 369 US 469, 470-73 (1962).

It has been helpfully observed that claims of employment discrimination, coupled with prayers for lost wages, are analogous to the common law action for breach of contract by wrongful discharge or an action in tort, with the Age Act creating the legal duty. *Cleverly v. Western Electric Co.*, 69 FRD at 350-51. To interpret this cause of action as one "incidental" or "integral" to the equitable issue of reinstatement would be to violate the rule of *Dairy Queen, Inc. v. Wood*, 369 US at 470, as just mentioned

As to the second and third phases of the *Ross* test, we believe that a monetary award for back wages is a traditional legal remedy and that the computation of such an award would not be beyond the practical capabilities of a jury. *Cleverly v. Western Electric Co.*, 69 FRD at 351. Consequently, all of the prerequisites to a trial by jury under the Age Act are satisfied.

Hence we hold the jury demand should not have been denied. That order is now vacated and the claim for back pay is remanded for trial by a jury.[7]

Vacated and remanded.

BUTZNER, Circuit Judge, concurring specially:

I agree with the majority opinion that 29 U. S. C. 626(b) entitles a litigant to a jury in an action for the recovery of lost wages resulting from a violation of the Age Discrimination in Employment Act of 1967. Although the Sixth Circuit has reached a contrary conclusion,* I concur in my brothers' ruling that the statute incorporates the provisions for a jury trial required by § 16(b) of the Fair Labor Standards Act, 29 U. S. C. § 216(b).

Since the statute settles the controversy, I find no occasion for embarking on the constitutional quest which my brothers pursue.

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[6] At once, we recognize that the Seventh Amendment extends its guarantee not only to common law forms of action recognized at its date of enactment — 1791 — but also to actions under modern statutes that create legal rights and remedies. Curtis v. Loether, 415 US at 194; see FRCiv. P. 38(a).

[7] In this court plaintiff for the first time moved to amend her complaint to include a claim for punitive damages. This motion must be remanded for presentation to the trial court. FRCiv. P. 15(a). Likewise items of costs and attorney's fees are matters for decision by that court.

* Morelock v. The NCR Corp., ——— F.2d ———, 45 U.S.L.W. 2316 (6th Cir. Dec. 20, 1976).

See Ashwander v. Tennessee Valley Authority, 279 U. S. 288, 346-48 (1936) (Brandeis, J., concurring) (especially rule 4).

APPENDIX C

Francis P. PONS, Plaintiff,

v.

LORILLARD, a Division of Loew's Theatres, Inc., Defendant.

No. C-75-380-G.

United States District Court,
M. D. North Carolina,
Greensboro Division.
Jan. 21, 1976.

Norman B. Smith, Greensboro, N. C., for plaintiff.

Thornton H. Brooks and M. Daniel McGinn, Greensboro, N. C., for defendant.

MEMORANDUM

GORDON, Chief Judge.

(1) This matter is before the Court on defendant Lorillard's motion to strike the plaintiff's demand for trial by jury. The question for the Court's resolution is whether the Seventh Amendment right to trial by jury extends to an action for injunctive reinstatement, lost wages, liquidated damages, and costs and attorney fees under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970). The question turns upon whether trial by jury is obtainable on the lost wages issue. Plaintiff makes no argument that the other issues will support trial by jury, and there is no authority to support such an argument.

The question appears to be one of first impression in this circuit.[1] Plaintiff relies upon *Chilton v. National Cash Register Company*, 370 *F.Supp.* 660 (S. D.Ohio 1974), apparently the sole case of precedential value determining the right to jury trial on the issues of Discrimination Act. *Chilton* rejected trial by jury on the issues of liquidated damages, and costs and attorney fees,[2] but upheld the right on the issue of lost wages. Claims of employment discrimination coupled with prayers for lost wages were characterized as not only legal in nature as monetary damages, but also cognizable at

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[1] Plaintiff points out that this Court has twice before allowed jury trials in age discrimination actions. In those cases, however, no issue was taken with the plaintiffs' demands for jury trial. The cases are of no precedential value here.

[2] The enforcement provision of the Age Discrimination Act, 29 U.S.C. § 626(b), provides that "liquidated damages shall be payable only in cases

law as claims analogous to common law actions for breach of contract by wrongful discharge and, furthermore, well within the practical abilities and limitations of the jurors. 370 F.Supp. at 665. Because it analyzed the operative enforcement section of the Age Discrimination Act, 29 U.S.C. § 626, in light of sections 16 and 17 of the Fair Labor Standards Act, 29 U.S.C. §§ 216, 217 (1970), the court, in finding a right to trial by jury on the lost wages issue, declined to compare age discrimination actions with Title VII cases. *Id.* at 666.

Chilton is by no means dispositive of the question. Actions for lost wages under the Age Discrimination Act are logically analogous to actions for lost wages under Title VII. Like awards of back pay under Title VII, the award of back pay sought by the plaintiff here is "equitable — intended to restore the (recipient) to . . . rightful economic status absent the effects of the unlawful discrimination." *Robinson v. Lorillard Corporation*, 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed under rule 60*, 404 U.S. 1006, 92 S.Ct. 573, 30 L.Ed.2d 655 (1971). The Fourth, Fifth, Sixth, and Ninth Circuits have found an award of back pay under Title VII to be equitable. *Robinson v. Lorillard Corporation, supra; Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125* (5th Cir. 1969); *EEOC v. Detroit Edison*, 515 F.2d 301, 308 (6th Cir. 1975); *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *Cf. Smith v. Hampton Training School*, 360 F.2d 577, 581 n. 8 (4th Cir. 1966) (en banc); *Harkless v. Sweeney Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971); *McFerren v. County Board of Education*, 455 F.2d 199, 202-04 (6th Cir. 1972). It is concluded that a comparison of the enforcement provisions of the Age Discrimination Act and Title VII is the proper starting point for analysis of the right to jury trial for lost wages under 29 U.S.C. §§ 621-634.

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of willful violations of this chapter." The **Chilton** court held an award of liquidated damages to be within the sound discretion of the court, thus not entitling either party to a trial by jury. 370 F.Supp. at 606, **citing McClanahan v. Matthews**, 440 F.2d 320 (6th Cir. 1971), and **Ross v. Bernhard**, 396 U. S. 531, 90 S.Ct. 733, 24 L.Ed.2d 729 (1970). In the hearing on the defendant's motion to strike the jury demand, plaintiff candidly conceded that the liquidated damages issue would not be triable to a jury.

Chilton also held that attorney fees and costs "are to be heard only by the Court and to be awarded in this Court's discretion." 370 F.Supp. at 666, **citing Hodgson v. Miller Brewer Co.**, 457 F.2d 221 (7th Cir. 1972).

It is undisputed that trial by jury in a statutory action is required only "if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis v. Loether*, 415 U.S. 189, 194, 94 S.Ct. 1005, 1008, 39 L.Ed.2d 260 (1974). In *Curtis* the Supreme Court held that the fair housing provisions of Title VIII of the Civil Rights Act of 1968, which authorizes private plaintiffs to bring civil actions to redress violations of the Act's fair houing provisions, entitled either party to demand a jury trial. But the court "strongly suggested that the employment provisions found in Title VII do not." *Slack v. Havens, supra* at 1094. The distinction between the two statutes lay in a comparison of the "damages" language of section 812 of the Act, 42 U.S.C. § 3612, with the "equitable relief" language of 42 U.S.C. § 2000e-5 (g), and in a comparison of the mandatory nature of the section 812 award with the discretionary nature of the back pay award under Title VII. In clarifying a point of some confusion, the court refused to say that "any award of monetary relief must necessarily be 'legal' relief," *Curtis v. Loether*, 415 U.S. at 196, 94 S.Ct. at 1009, for the purposes of the jury trial requirement. *See Slack v. Havens, supra* at 1094.

(2) In *Chilton v. National Cash Register Company, supra*, the case relied upon by plaintiff, the course seemed to begin its analysis with the observation that an action for monetary damages had to be "legal" in character.[3] While the court there recognized that a suit under section 626(b) of the Age Discrimination Act only for injunctive reinstatement would sound in equity, it concluded that an action under section 626(b) for reinstatement and lost wages would raise both legal and equitable claims. 370 F.Supp. at 664. Under *Dairy*

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[3] **Chilton** analyzed section 626(b) of the Age Discrimination Act in light of sections 16 and 17 of the Fair Labor Standards Act, but the critical determination there was that a 626(b) claim for lost wages was a legal claim. **Ross v. Bernhard, supra** note 2, at 396 U. S. 531, 538, 90 S.Ct. 733 n. 10 held that the "legal" nature of an issue is determined by considering whether (1) the issue is legal rather than equitable under pre-merger custom, (2) the remedy sought is legal, not equitable, and (3) the issue is triable to a jury given its practical abilities and limitations. **The Chilton** court found the first test satisfied because claims of employment discrimination and prayers for lost wages were analogous to common law actions for breach of contract, and, according to pre-merger custom, would have been cognizable at law. The second test was satisfied by the plaintiff's claim for money damages, traditionally a legal remedy. The court found the third test easily satisfied. 370 F.Supp. at 665. Indeed, proof may be difficult, but the mere fact that it is does not take an action from the province of the jury. **See Dairy Queen v. Wood**, 369 U.S. 469, 478-79, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962).

Queen v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed. 2d 44 (1962), the legal claim, for lost wages, would have to be tried to a jury. The Supreme Court's decision in *Curtis* lends impetus towards a different result. Because a claim for monetary damages is not always legal, there is not necessarily a mixed claim at law and equity in an action for injunctive reinstatement and lost wages. What confronts the Court here is not a mixed claim, but a single cause of action which must be characterized as either legal or equitable. If the claim for lost wages is an integral part of an equitable remedy of reinstatement, then it makes no difference that monetary damages are involved.

In her attempt to persuade the Court that the issue of lost wages is triable to a jury, the plaintiff argues that the remedial provisions of the Age Discrimination Act and Title VII are critically distinct, as were the remedial provisions of Title VIII and Title VII in *Curtis v. Loether*. Section 626(b) of the Age Discrimination Act states that

> "(t)he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section . . . " 29 U.S.C. § 626(b) (1970).

The remedial provisions of Title VII state that

> "the court may enjoin the respondent from engaging in such lawful employment practice, and order other such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . ; or any other equitable relief as the court deems appropriate . . . " 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. II).

Plaintiff argues that it is apparent that Title VII remedies, including back pay, are denominated forms of "equitable relief," while section 626(b) empowers courts "to grant such legal or equitable relief as may be appropriate." The result of this argument is that actions for

back pay under Title VII are "equitable" while under the Age Discrimination Act they are "legal."

The right to trial by jury should not be dependent upon a slight degree of difference in statutory terms. In *Curtis* the Supreme Court compared the two statutes (Title VIII and Title VII) and found a "sharp contrast" in their remedial provisions. Section 812 clearly authorized actions to enforce "legal rights" within the Supreme Court's Seventh Amendment decisions because the relief available under the section — actual and punitive damages — was the traditional form of relief offered in the courts of law. 415 U.S. at 195-96, 94 S.Ct. 1005. Section 2000e-5(g) had been characterized as equitable by the courts of appeals and differed in several respects. There was no comparable discretion; if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount. Nor was there any sense in which the award under section 812 could be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff, 415 U.S. at 197, 94 S.Ct. 1005. Applying a similar analysis of the statutes here, it is apparent that there is no drastic difference like that evident in *Curtis*. The remedial provisions of section 626(b) and section 2000e-5(g) are similar, and their similarity is due to the fact that the statutes are designed to remedy correspondent evils. "With a few minor exceptions the prohibitions of (the Age Discrimination in Employment Act of 1967) are in terms identical to those of Title VII of the Civil Rights Act of 1964 except that 'age' has been substituted for 'race, color, religion, sex, or national origin.' " *Hodgson v. First Fed. Savings and Loan Ass'n of Broward County, Florida*, 455 F.2d 818, 820 (5th Cir. 1972).

Here the Court has chosen to compare age discrimination actions with Title VII cases. *In Chilton*, as noted, the district court took the opposite approach and drew on sections 216 and 217 of the Fair Labor Standards Act, incorporated in the enforcement provisions of the Age Discrimination Act, for guidance. While either approach may be fundamentally sound, the Court is persuaded that only a single cause of action is presented here, rather than the mixed claims of law and equity recognized in *Chilton*. An award of back pay is not viewed as "incidental" to injunctive relief, but as an integral part of that relief. Although plaintiff's action is founded upon the Age Discrimination Act rather than Title VII, her claim for lost wages is no less an integral part of the equitable remedy of reinstatement. "To consider it apart from that context would be to distort the traditional line dividing legal from equitable remedies."[4]

[4] While the Ninth Circuit Court of Appeals made this statement in a Title VII case in which the plaintiffs sought a jury trial by reason of a claim for lost wages, the Court believes that the statement should apply with equal force to age discrimination cases.

Slack v. Havens, supra at 1094.

Accordingly, counsel for the defendant will present a proposed order striking plaintiff's demand for trial by jury.

APPENDIX D

MORELOCK v. NCR CORP.
U. S. Court of Appeals,
Sixth Circuit (Cincinnati)

MORELOCK, et. al. v. THE NCR CORPORATION, Nos. 75-2220 and 75-2282, December 20, 1976.

Full Text of Opinion

THOMAS D. LAMBROS, District Judge:—This is an appeal from an action instituted pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1970). Essentially, the complaint charged that the NCR Corporation (NCR) did not maintain a bona fide seniority system[1] at its Dayton, Ohio facilities.

(PROCEEDINGS BELOW)

On the ground that this was an equitable action, NCR moved to strike the Appellants' jury demand. The District Court overruled this motion and the case was tried to a jury, with a verdict being returned in favor of the Appellants on April 1, 1975. Upon motion by NCR the District Court granted a judgment notwithstanding the verdict and a conditional new trial in favor of NCR.

Appellants appeal from the order of the District Court granting judgment notwithstanding the verdict. NCR cross-appeals as to the propriety of a jury trial in actions brought under the ADEA. For the reasons stated below we find that the District Court erred in overruling NCR's motion to strike the Appellant's jury demand. As this case was properly triable in its entirety in the District Court without a jury, we remand this case for findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ. P.

In 1938 actions at law and suits in equity were merged into a single "civil action".[2] While this merger abolished the procedural distinction between these actions, the substantive distinctions have been retained for purposes of determining issues triable by jury. *Kennedy v. Lakso*, 414 F.2d 1249, 1251 (3rd Cir. 1969). The basic

*The Honorable Thomas D. Lambros, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

[1] 29 U.S.C. § 623(f) (1970) procides in pertinent part:

> It shall not be unlawful for an employer, employment agency, or labor organization—(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purpose of this chapter . . .

[2] Rule 2, Fed. R. Civ. P.

principle remains that a civil action in the nature of an action at law is triable to a jury, while one in the nature of a suit in equity is properly tried to the court. See *Kennedy v. Lakso, supra*, at 1251.

(SEVENTH AMENDMENT)

As a result of the 1938 merger, the federal courts must often determine the right to a jury trial in actions which present mixed questions of law and equity within the context of a single case. This right, guaranteed by the Seventh Amendment "(i)n suits at common law, where the value in controversy shall exceed twenty dollars", has been preserved[3] and extended to apply to actions enforcing contemporary statutory rights, so long as the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law. See e.g. *Curtis v. Loether*, 415 U.S. 189, 194 (1974). However, the mere fact that a monetary award is an incident of the relief requested does not mandate that an action be characterized as legal rather than equitable. See e.g., *Curtis v. Loether, supra* at 196; *Slack v. Havens*, 522 F.2d 1091, 1094, (9th Cir. 1975). In certain actions monetary relief is an integral part of an equitable action to which the Seventh Amendment is inapplicable. See e.g. *Slack v. Havens, supra* at 1094; *Wirtz v. Jones*, 340 F.2d 901, 904, 5th Cir. 1965). The propriety of jury trials in cases presenting such mixed questions of law and equity is determined by the nature of the issue to be tried. *Ross v. Bernhard*, 396 U.S. 531, 538 (1970).

Appellants allege violations of § 623 of the ADEA. This section provides in pertinent part:

> § 623. (a) It shall be unlawful for an employer —
>
> (1) to fail to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

[3] Rule 38, Fed. R. Civ. P.

The applicable enforcement provisions of the ADEA invoked by the Appellants are set forth in § 626:

§ 626. (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act, prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title; PROVIDED, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation, judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter; PROVIDED, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

Pursuant to these provisions Appellants sought relief from the trial courts in the form of reinstatement with back pay and benefits, a preliminary and permanent injunction enjoining NCR from discriminating against any and all of the Appellants because of their age, and compensatory, punitive and liquidated damages.[4] In order to determine the nature of the issue to be tried in this case ,and therefore the propriety of a jury trial, it is necessary to evaluate the ADEA, and particularly § 626, in view of the relief requested by the Appellants.

(ADEA AND TITLE VII)

First Federal Sav. & L. Ass'n of Broward Co., Fla., 455 F.2d 818, 820,

The ADEA is an offspring of the Civil Rights Act of 1964.[5] Enacted in 1967, the express purpose of the Act is to promote the "employment of older persons based on their ability rather than age" and to prohibit "arbitrary age discrimination".[6] The prohibitions of the ADEA are in terms virtually identical to those of Title VII of the Civil Rights Act of 1964,[7] except that "age" has been substituted for "race, color, religion, sex or national origin." *Hodgson v.*

(5th Cir. 1972). The similarities between Title VII and the ADEA are "hardly accidental", and although it may be inappropriate to simply borrow and apply the standards of Title VII to the ADEA automatically, an analogous application of such standards should not be disregarded. See *Laugesen v. Anaconda Co.*, 510 F.2d 307, 311, (6th Cir. 1975). An analysis of the ADEA, therefore, necessarily requires some discussion of Title VII.

The enforcement provisions of Title VII are set forth in 42 USC § 2000e-5. This section provides *inter alia* for a two-tier system of enforcement by which aggrieved individuals initially seek redress through the Equal Employment Opportunities Commission, with the right reserved to proceed in private civil litigation should such individual be dissatisfied with the Commission's efforts. These enforcement provisions are modeled after those of the National Labor Relations Act (NLRA), 29 U.S.C. § 160(c) (1970), which has as its objective the vindication of the public interest by making employees whole for losses suffered through unfair labor practices. See *Mims v. Wilson*, 514 F.2d 106, 110, (5th Cir. 1975). The provisions of § 2000e-5 have been modified from those of the NLRA in order to permit private civil actions to redress violations of Title VII. However, the basic thrust of Title VII, like the NLRA, is remedial in nature and is directed at the consequences of unfair employment practices. See *Palmer v. General Mills, Inc.*, 513 F2d. 1040, (6th Cir. 1975).

(FUNCTION OF COURT)

The function of the Court in dealing with violations of Title VII is provided in 42, U.S.C. § 2000e-5 (g):

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

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[4] Two of the five Appellants have never been laid off, demoted or otherwise had their position, or the work performed thereunder, altered.

[5] See, H.R. Rep. No. 805, 1967 U. S. Code Cong. and Adm. News p2213 ct. seq. Also see S. Rep. No. 872, 1964 U. S. Code Cong. and Adm. News p. 2355, 2408.

[6] 29 U.S.C. § 621(b) (1970).

[7] 42 U.S.C. § 2000e-1 et. seq. (1970).

Private actions pursuant to this section have been held to be equitable in nature and therefore not triable by jury.[8] See e.g. *McFerren v. County Board of Ed. of Fayette Co., Tenn.*, 455 F.2d 199, (6th Cir. 1972); *King v. Laborers Internat. U. of No. America, Local 818*, 443 F.2d 273, (6th Cir. 1971). The monetary relief available under this section in the form of back pay is an integral part of the equitable remedy of reinstatement, and is a form of restitution, not damages. See e.g. *E.E.O.C. v. Detroit Edison Co.*, 515 F.2d 301, (6th Cir. 1975).

Although the prohibitory provisions of Title VII and the ADEA are in terms identical, the enforcement sections of these acts differ. The enforcement provisions of § 626 of the ADEA essentially follow those of the Fair Labor Standards Act (FLSA).[9] These enforcement provisions replaced those in the original congressional bill, which had provided for enforcement provisions similar to those of the NLRA.[10] The effect of this modification is to allow individuals, as well as the Secretary of Labor, to seek remedies through court action.[11] The applicable provisions of the FLSA are found in 29 U.S.C. §§ 216, 217, (1970) which provide in pertinent part:

§ 216. (b) Any employer who violates the provisions of section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated . . . The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation.

§ 217. The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a) (2) of this title the restraining of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter . . .

(ACTIONS BY SECRETARY)

Addressing § 217 initially, actions by the Secretary of Labor pursuant to this section have been held to be equitable in nature and exclusively within the province of the court, e.g. *Paradise Valley Investigation and Patrol Services, Inc. v. Dunlop*, 521 F.2d 1342, (9th Cir. 1976); *Geyer Broadcasting Co. v. Holder*, 14 Fed. Rules Serv.

2d. 621, (7th Cir. 1970); *Sullivan v. Wirtz*, 359 F2d. 426, (5th Cir. 1966). The purpose of § 217 is to correct a continuing offense against the public interest by assuring effective and uniform compliance with and adherence to the public policy relating to wage standards set forth in the FLSA. See e.g. *Wirtz v. Atlas Roofing Mfg. Co.*, 377 F.2d 112 (5th Cir. 1967); *Wirtz v. Jones, supra; Wirtz v. Ocala Gas Co.*, 336 F.2d 236, (5th Cir. 1964). The enforcement of a monetary award as an incident to injunctive relief in actions under § 217 is simply a part of the reasonable and effective means of bringing about compliance with the FLSA, *Wirtz v. Jones, supra.*

Pursuant to § 216(b) individuals are permitted to proceed in private civil actions to redress violations of the FLSA. Such actions have been characterized as actions at law, and on proper demand, triable before a jury. See e.g. *Wirtz v. Jones, supra.* However, the provisions of § 216(b) must be considered in conjunction with those of 29 U.S.C. § 626(c) in order to ascertain the nature of the issues presented in individual actions under the ADEA.[12] Section 626(c) provides that "(a)ny person aggrieved may bring a civil action . . . for such legal or equitable relief as will effectuate the purposes of this chapter."

The terms of this section serve to expand the individual's power to proceed in private civil actions beyond that afforded him by § 216(b) of the FLSA. In actions pursuant to § 216(b) individuals are limited to seeking legal remedies and are precluded from obtaining injunctive relief. See *Powell v. Washington Post Co.*, 267

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[8] In discussing actions pursuant to 42 U.S.C. § 2000e-5(g), the United states Supreme Court in **Curtis v. Loether, supra** at 267, observed, in dicta, that the language of this section, authorizes an equitable action for reinstatement and back pay, as opposed to an action for damages, which is inappropriate for trial by jury. The Supreme Court further noted that this language committed the decision to award back pay to the discretion of the trial judge, and that such an award in fact constitutes funds wrongfully withheld from the plaintiff. See also **Slack v. Havens, supra.**

[9] 29 U.S.C. § 201 et. seq. (1970). The enforcement provisions of the ADEA also include subsection (c) of 29 U.S.C. § 626.

[10] 29 U.S.C. § 160 et. seq.

[11] See H.R. Rep. No. 805, 1967 U.S. Code Cong. and Adm. News p. 2213, 2218. The legislative history of Title VII and the ADEA demonstrates that although the express enforcement provisions of these acts differ, the provisions of each act originated in the NLRA and were respectively modified in order to permit individuals to seek relief through civil litigation. It has been observed that the primary burden of enforcing equal employment statutes is on the private plaintiff. **Romasanta v. United Airlines, Inc.**, 537 F.2d 915, (7th Cir. 1976).

F.2d 651 (D.C. Cir. 1959); *Roberg v. Henry Phipps Estate*, 156 F.2d 958 (2d Cir. 1946); *Bowe v. Judson C. Burns, Inc.*, 137 F.2d 37)3rd Cir. 1943). Section 626(c) gives individuals the right to seek equitable as well as legal relief. Effectively, § 626(c) of the ADEA supplements the provisions of § 216(b) of the FLSA as to permit individuals to seek the same remedies for violations of the ADEA as are available to the Secretary of Labor.[13]

(DISCRETION OF COURT)

In "any action" involving violation of the ADEA the provisions of 29 U.S.C. § 626(b) empower the Court to "grant such legal or equitable relief as . . . appropriate to effectuate the purposes of this chapter, including without limitation . . . employment, reinstatement or promotion , . . . or amounts deemed . . . unpaid minimum wages or unpaid overtime compensation".[14] The scope of power and the degree of discretion vested in the Court by these provisions parallel that provided the Court in actions pursuant to 29 U.S.C. § 217 and 42 U.S.C. § 2000e-5. Such discretion and power have been important factors in the characterization of an action as being equitable in nature.[15] Appellants' action in this case[16] is basically for reinstatement and injunctive relief. Such an action necessarily invokes the broad powers of the Court and is essentially equitable in nature. The monetary relief sought by the Appellants is the equivalent of funds allegedly wrongfully withheld from them by NCR in the past, and is an integral part of the basic equitable claim for reinstatement. Accordingly, the issues to be tried in this case are equitable in nature, directly analogous to the equitable issues pursued in actions under 29 U.S.C. § 217 and 42 U.S.C. § 2000e-5, and not suitable for trial by jury.[17]

As no constitutional right to a jury trial existed in this action, the jury impaneled by the District Court was, in effect, an advisory one. *Hyde Properties v. McCoy*, 507 F.2d 301 (6th Cir. 1974).[18] When an advisory jury is used, the ultimate responsibility for findings of fact and conclusions of law remains with the district court. See *Hyde Properties v. McCoy, supra; Frostie Co. v. Dr. Pepper Co.*, 361 F.2d 124 (5th Cir. 1966); *Mallory v. Citizens Utility Co.*, 342 F.2d 796 (2d Cir. 1965). Where the district court fails to provide findings of fact and conclusions of law, the proper procedure is to vacate the judgment and remand the case for such findings, *Armstrong v. Collier*, 536 F.2d 27, 72 (5th Cir. 1976).[19] Accordingly, we remand this case to the District Court for findings of fact and conclusions of law in accordance with Rule 52, Fed. R. Civ. P.[20]

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[12] Statutes should not be construed in such a fashion as to render certain provisions superfluous or insignificant. **Ziegler Coal Co. v. Kleppe**, 536 F.2d 398 (D.C. Cir. 1976).

[13] See 29 U.S.C. § 217.

[14] The language of 29 U.S.C. § 626(b) "such legal or equitable relief as will effectuate the purposes of this chapter" is repeated in 29 U.S.C. § 626(c) regarding the remedies available to individuals in actions brought under this section.

[15] See N. 7,**supra.**

[16] The ADEA is not to be applied formalistically, but on a case by case basis. See **Laugesen v. Anaconda Co., supra** at 312 n. 4, 10 FEP Cases at 571.

[17] The right to trial by jury in which an individual seeks purely legal damages under the ADEA is not before the Court in this case. It has been held that in such a situation the individual is entitled to a jury trial, **Chilton v. NCR Co.**, 370 F.Supp. 660, (S.D. Ohio 1974). We note, however, that the Chilton case did not consider either the ADEA's close similarity with Title VII or the import of 29 U.S.C. § 626(c). See **Laugesen v. Anaconda Co., supra** at 312 n. 2.

[18] After the decision in the **Hyde Properties v. McCoy** case had been circulated and approved by the three judges constituting the panel, the court was notified through the Clerk that the parties were engaged in efforts to settle their differences. At that time, however, the Clerk had not received a formal notification of settlement from the parties. In the absence of such notification the opinion of the Court was forwarded to the printer for publication. Subsequent to that time, but before the release of the printed opinion, the Court received formal notification of settlement from the parties. Accordingly, the **Hyde Properties v. McCoy** does not have full precedential effect before this Court. However, we find it persuasive in the instant case.

[19] It is well settled that Rule 52(a), Fed. R. Civ. P., is not a jurisdictional requirement for appeal, and that where there is a sufficient basis for the appellate court to consider the merits of the case remand is not required. See **King v. Commissioner of Internal Revenue**, 458 F.2d 245, 249 (6th Cir. 1972); **Armstrong v. Collier, supra** at 77. However, remand is particularly appropriate in the case at bar. This case involves a very complex seniority system which was the result of many years of collective bargaining experience. In evaluating cases presenting such seniority systems the courts must look beyond what may be facially neutral policies and view such systems in light of their effect in operation, not in the abstract, *cf.* **Laugesen v. Anaconda Co., supra.** See **EEOC v. Detroit Edison Co.**, 515 F.2d 301, (6th Cir. 1975); **Jersey Central Power & Light Co. v. Local Unions of Intern. Broth. of Elec. Workers**, 508 F.2d 687, (3rd Cir. 1975). Findings of fact and conclusions of law are appropriate in such cases not only to assist the trial court in the adjudicatory process, but also to assist the appellate court in reviewing such complex evaluations.

[20] In view of the disposition of this case we find it unnecessary to address the remaining issues presented by this appeal.

Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1346

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,
Petitioner,

v.

FRANCES P. PONS, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 31, 1977

CERTIORARI GRANTED JUNE 27, 1977

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DOCKET ENTRIES

Proceedings in United States District Court, Middle District of North Carolina—No. C-75-380-G

September 11, 1975—Complaint, with jury demand, filed

November 5, 1975—Answer and Motion of defendant to strike demand for jury trial, filed

December 19, 1975—Initial pre-trial conference and hearing on Motion to strike demand for jury trial

January 21, 1976—Memorandum of Court granting defendant's Motion to strike plaintiff's demand for jury trial

January 29, 1976—Order that plaintiff's demand for jury trial be stricken

February 3, 1976—Amendment to Order of January 29 certifying an immediate appeal

Proceedings in United States Court of Appeals for the Fourth Circuit No. 76-1369

February 23, 1976—Order granting plaintiff's petition for permission to appeal interlocutory order of District Court

October 7, 1976—Appellant Pons' Motion for leave to amend complaint filed

October 14, 1976—Appellee Lorillard's response in opposition to motion for leave to amend complaint filed

October 21, 1976—Letter advising counsel that motion to amend complaint should be presented at oral argument

November 9, 1976—Cause argued before Bryan, Senior Circuit Judge, and Butzner and Russell, Circuit Judges, and submitted

February 2, 1977—Opinion filed and judgment of the District Court vacated and remanded

February 16, 1977—Order granting Appellee Lorillard's motion for stay of mandate filed

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

No. C-75-380-G

(Title omitted in printing)

Complaint

Plaintiff, complaining of defendant, alleges and says:

(1) Plaintiff is a citizen and resident of Greensboro, Guilford County, North Carolina.

(2) Defendant is a foreign corporation, authorized to do business and doing business in the State of North Carolina, with a place of business in Guilford County, North Carolina.

(3) Jurisdiction of this action is founded upon 29 U.S.C. 626(b), (c); 29 U.S.C. 217; and 29 U.S.C. 216(b).

(4) Plaintiff was first employed by defendant on March 3, 1960. As of January 31, 1975, plaintiff had advanced to the position of Financial Services Coordinator. Plaintiff performed all of the duties assigned to her in a professionally competent manner, and plaintiff faithfully followed all instructions given her by her supervisors. Plaintiff abided by all of the rules and regulations of defendant.

(5) Plaintiff was born on June 10, 1926. When she was 48 years of age, on January 31, 1975, defendant and its agents and servants fired her. Plaintiff's dismissal was part of a policy of defendant to discharge older employees and to retain young people as employees wherever possible, to the detriment and discrimination of employees over the age of 40 and under the age of 65. This conduct of the part of defendant, and its agents and servants, was and continues to be willful.

(6) By the acts herein complained of, defendant discriminated, and continues to discriminate, against plaintiff and other persons who are at least 40 years of age but less than 65 years of age. This conduct of defendant is in violation of the provisions of 29 U.S.C. 623(a)(1), which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

(7) At the time of plaintiff's discharge, she was receiving a base salary of $905.00 per month.

(8) On or about June 3, 1975, plaintiff gave notice to the Secretary of Labor, as required by 29 U.S.C. 626(d), of her intent to file this action. The unlawful practice of defendant was not eliminated by the efforts of the Secretary of Labor through methods of conciliation, conference, and persuasion.

WHEREFORE, plaintiff prays of the court:

(1) Enter a permanent injunction against defendant, enjoining and restraining it from failing or refusing to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age;

(2) Enter an injunction against defendant requiring defendant to reinstate plaintiff as an employee, and thereafter not to discriminate against her because of her age;

(3) Award plaintiff attorney monetary damages consisting of wages from date of discharge to date of judgment, together with an equal amount of liquidated damages;

(4) Award plaintiff reasonable attorney's fee and the costs of this action, to be taxed against defendant;

(5) Grant plaintiff such other and further relief as to the court may seem just and proper.

NORMAN B. SMITH
Attorney for Plaintiff
Smith, Carrington, Patterson,
Follin & Curtis
704 Southeastern Building
Greensboro, North Carolina 27401
Telephone: 919-274-2992

DEMAND FOR JURY TRIAL

Plaintiff demands trial by jury on all issues of fact in this action.

(Jurat omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil Action No. C-75-380-G

(Title omitted in printing)

Answer of Lorillard, a Division of Loews Theatres, Inc.

Defendant Lorillard, a Division of Loews Theatres, Inc., for its answer to the Complaint herein, avers:

FIRST DEFENSE

The Complaint fails to state a claim against this defendant upon which relief can be granted.

SECOND DEFENSE

1.

The allegations of Paragraph 1 of the Complaint are admitted.

2.

The allegations of Paragraph 2 of the Complaint are admitted.

3.

Paragraph 3 of the Complaint, containing no allegations of fact, requires no response.

4.

It is admitted that plaintiff was first employed by defendant on 3 March 1960 and as of 31 January 1975 occupied the position of Financial Services Coordinator. Defendant leaves plaintiff to her proof as to the remaining allegations of Paragraph 4 of the Complaint.

5.

It is admitted that plaintiff was born on 10 June 1926. Plaintiff, together with a number of other employees, was terminated on 31 January 1975 for good cause. The remaining allegations of Paragraph 5 of the Complaint are specifically denied.

6.

The allegations of Paragraph 6 of the Complaint are denied.

7.

The allegations of Paragraph 7 of the Complaint are admitted.

8.

It is admitted that on 3 June 1975, counsel for plaintiff notified the Area Director, Wage and Hour and Public Contracts Division of the United States Department of Labor, by letter of plaintiff's notice of intent to file a civil action to enforce her rights under the Age Discrimination in Employment Act. It is admitted that a representative of the United States Department of Labor reviewed the circumstances involved in this case, but was unable to work out a solution that was agreeable to the parties. Except as herein admitted, the allegations of Paragraph 8 of the Complaint are denied.

WHEREFORE, having answered the Complaint of the plaintiff, this defendant prays that the Court:

(a) Dismiss the Complaint;

(b) Deny the relief requested in the Complaint;

(c) Grant to this defendant such other and further relief as may be just and proper, including its costs, expenses and reasonable counsel fees incurred in the defense of this action.

This the 5th day of November, 1975.

THORNTON H. BROOKS
M. DANIEL MCGINN
BROOKS, PIERCE, MCLENDON, HUMPHREY
& LEONARD
P. O. Drawer U
Greensboro, North Carolina 27402
Telephone: 919-273-2591
Attorneys for Defendant Lorillard,
a Division of Loews Theatres, Inc.

(Certificate of Service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil Action No. C-75-380-G

(Title omitted in printing)

Motion to Strike Demand for Jury Trial

COMES Now defendant Lorillard, a Division of Loew's Theatres, Inc., and moves the Court to strike the request for jury trial heretofore served and filed by plaintiff and to assign the cause to the non-jury calendar on the grounds that no right of trial by jury exists under the Constitution or the laws of the United States as to the issues of fact herein.

This 5th day of November, 1975.

THORNTON H. BROOKS
BROOKS, PIERCE, MCLENDON, HUMPHREY
& LEONARD
P. O. Drawer U
Greensboro, North Carolina 27402
Telephone: 919-273-2591
Attorney for Defendant Lorillard

(Certificate of Service omitted in printing)

Notation

The Memorandum of the United States District Court by Gordon, Chief Judge, entered on January 21, 1976, appears as APPENDIX C, pages 7a-12a in the Appendix of Lorillard's Petition for a Writ of Certiorari, filed on March 31, 1977.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

Civil Action No. C-75-380-G

(Title omitted in printing)

Order

THIS CAUSE came on to be heard on Defendant's Motion to Strike Demand for Jury Trial and transferring the action to the non-jury calendar, and the Court having heard the argument of counsel, and having considered the briefs and the record, and being fully advised, it is

ORDERED, for the reasons set forth in the Memorandum filed on 21 January 1976 that plaintiff's demand for jury trial be stricken and that this action be placed on the non-jury calendar.

This the 29 day of January, 1976.

EUGENE A. GORDON
United States District Judge

APPROVED AS TO FORM:

NORMAN B. SMITH
Counsel for Plaintiff

THORNTON H. BROOKS
Counsel for Defendant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1976 Term

No. 76-1369

(Title omitted in printing)

Motion of Plaintiff-Appellant for Leave to Amend the Complaint

Now COMES, plaintiff-appellant in the above-entitled case, and respectfully moves this court for leave to amend her complaint upon remand to the District Court, as follows:

1. Add a new paragraph 5A, immediately following the present paragraph 5:

> 5A. By discriminating against plaintiff, defendant acted purposefully and intentionally, willfully, wantonly, oppressively and with a reckless disregard of plaintiff's rights.

2. Add a new paragraph 7A, immediately following the present paragraph 7:

> 7A. In addition to loss of wages, plaintiff has suffered depression and anxiety, and humiliation and embarrassment proximately and directly as a result of defendant's wrongful conduct.

3. Delete the third paragraph of the prayer for relief and substitute therefor:

> (3) Award plaintiff monetary damages consisting of lost wages and all of her other actual damages, statu-

tory liquidated damages, and common law punitive damages;

Respectfully submitted,

NORMAN B. SMITH
Attorney for Plaintiff
SMITH, PATTERSON, FOLLIN, CURTIS & JAMES
704 Southeastern Building
Greensboro, North Carolina 27401
Telephone: (919) 274-2992

(Certificate of Service omitted in printing)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-1369

(Title omitted in printing)

Response by Defendant-Appellee in Opposition to Motion for Leave to Amend the Complaint

COMES Now Lorillard, a Division of Loews Theatres, Inc., defendant-appellee in the above case, and files its response in opposition to the motion of plaintiff-appellant for leave to amend her complaint, and as grounds for its opposition, shows:

1.

Background Information

Plaintiff filed her Complaint in the District Court on 11 September 1975 (Appendix, pp. 4-7). On 5 November 1975, defendant-appellee filed its Answer to the Complaint (A., pp. 8-10), together with a Motion to Strike Demand for Jury Trial (A., p. 11).

An initial pre-trial conference was held before the Court on 19 December 1975, at which time, no request was made by the parties to amend their pleadings, and it was ordered that discovery be completed by 15 April 1976 (A., pp. 12-14).

On 21 January 1976, the Court entered its Memorandum Opinion setting forth its reasons for granting defendant-appellee's motion to strike plaintiff's demand for jury trial (A., pp. 15-25), and an Order to that effect was entered on 29 January A., p. 26).

On 23 February 1976, this Court entered an Order granting plaintiff-appellant's petition for permission to appeal the interlocutory order of the District Court which had granted defendant-appellee's motion that plaintiff's

demand for jury trial be stricken and that the action be placed on the non-jury calendar (A., p. 31).

The Clerk of this Court notified counsel for the parties on 1 October 1976 that the case had been set for oral argument in Richmond on Tuesday, 9 November 1976.

On 7 October 1976, plaintiff-appellant filed in this Court her motion for leave to amend the Complaint in three respects.

2.

Any Motion to Amend the Complaint Should Be Filed with the District Court upon Remand, And Is Not Properly Before This Court

While plaintiff-appellant's motion is addressed to, and filed in, this Court, yet plaintiff seeks leave "to amend her complaint upon remand to the District Court" in the specified respects. A motion to amend a complaint is properly addressed to the District Court, and not to the appellate court. Rules 1 and 15, Federal Rules of Civil Procedure.

The only motion to amend a complaint in the appellate court is one that relates to *defective allegations of jurisdiction*. 28 U.S.C.A. §1653 provides:

> "§ *1653. Amendment of pleadings to show jurisdiction*
>
> "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

The instant motion to amend does not purport to relate to deficient allegations of jurisdiction. The Court stated in *First National Bank of Cincinnati* v. *Pepper*, 454 F. 2d 626, 635-6 (2nd Cir. 1972):

> "Finally, two days before the argument of this appeal Mrs. Arlinghaus moved this court to amend the complaint by adding a fourth cross-claim against Pepper arising out of a recent judgment in the amount

> of $19,842.19 rendered by a New Jersey state court in favor of her husband's estate against him. *Except to the limited extent of permitting defective jurisdictional allegations to be amended pursuant to 28 U.S.C. § 1653, we cannot consider a 'new issue, not raised by the pleadings in the District Court or considered by it,' whether raised by motion to amend a complaint or otherwise.* Walker v. Felmont Oil Corp., 262 F.2d 163, 165 (6th Cir. 1958), cert. denied, 361 U.S. 840 (1959) (denying a motion to file a supplemental complaint). Accordingly the motion is denied without prejudice to its renewal in the district court" (emphasis added).

To same effect, *International Ladies' Garment W.U.* v. *Donnelly G. Co.*, 121 F. 2d 561, 563 (8th Cir. 1941).[1]

As the matter pending before this Court relates solely to the issue of whether plaintiff is entitled to a trial of her action before a jury, or before the Court without a jury, the action will perforce be remanded to the District Court and plaintiff-appellant may then and there file such motions for amendment as she is advised.

3.

Motion Fails to Adequately State the Grounds on Which It Is Based

Even if this Court has the power to grant the requested motion, it should deny same under the circumstances here disclosed.

Rule 27, Federal Rules of Appellate Procedure, provides that motions filed in an appellate court "*shall state with*

---

[1] This Court in *Tahir Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865, 871 (4th Cir. 1941), refused to permit an amendment to the complaint by plaintiff as urged at oral argument before the Court, stating: ". . . While we might allow the amendment here, we think it better practice to permit it to be made before the District Court in connection with further proceedings to be had upon the remand."

particularity the grounds on which it [the motion] is based." The motion under review does not disclose why plaintiff-appellant at this late date, and in this forum, seeks to amend her Complaint in the respects mentioned.

As noted above, it is clear that the purpose of the proposed amendment is not to cure any possible deficiencies in the jurisdiction of the Court. As shown, plaintiff had ample opportunity to seek to amend her Complaint in the District Court while the case was there pending, but did not choose to do so, and to defendant's knowledge and belief, discovery has not disclosed any matters that plaintiff overlooked in presenting her claim to the District Court. ". . . [W]e also recognize that the function of Rule 15(a) [Federal Rules of Civil Procedure] is generally 'to enable a party to assert matters that were overlooked or were unknown to him at the time he interposed his original complaint or answer.' C. Wright & A. Miller, 6 Federal Practice and Procedure: Civil § 1473, at 375 (1969). . . ." *Weinberger* v. *Retail Credit Co.*, 498 F. 2d 552, 554, n. 4 (4th Cir. 1974).

Possibly the undisclosed purpose of the proposed motion is to enlarge or change the theory of the cause of action alleged in the original complaint, by basing her cause of action not only on a law of the United States (namely, the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634), but also on a common law tort claim. If this is the purpose of the motion, it should be denied because such theory was not raised before the District Court and therefore cannot be raised for the first time before the Court of Appeals. The applicable standard is enumerated in *Walker* v. *Felmont Oil Corporation*, 262 F. 2d 163, 165 (6th Cir. 1958):

> ". . . The taking of the appeal divested the District Court of jurisdiction of the case, transferring it to the Court of Appeals. Thompson v. Harry C. Erb, Inc., 3 Cir., 240 F.2d 452, 454. A new issue, not raised by the pleadings in the District Court or considered by it, can not be raised for the first time on appeal. [Citing cases.]"

The issue reviewed by the District Court in this case was stated in its Memorandum Opinion to be (A., p. 15):

> ". . . The question for the Court's resolution is whether the Seventh Amendment right to trial by jury extends to an action for injunctive reinstatement, lost wages, liquidated damages, and costs and attorney fees under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1970)."

If plaintiff-appellant proposes by her motion to pose a different, or additional issue, she cannot do so for the first time before this Court.

Conclusion

For the foregoing reasons, defendant-appellee opposes the motion of plaintiff-appellant before this Court to amend her complaint in the respects mentioned.

Respectfully submitted,

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Greensboro, North Carolina 27402
Telephone: 919-273-2591
Attorneys for Defendant-Appellee Lorillard

Dated: 13 October 1976

(Certificate of Service omitted in printing)

Notation

The Opinion of the United States Court of Appeals entered on February 2, 1977, appears as APPENDIX B, pages 2a-7a in the Appendix of Lorillard's Petition for a Writ of Certiorari, filed on March 31. 1977.

Notation

The Judgment of the United States Court of Appeals entered on February 2, 1977, appears as APPENDIX A, page 1a in the Appendix of Lorillard's Petition for a Writ of Certiorari, filed on March 31, 1977.

Supreme Court, U. S.
FILED
JUN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1346

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,

Petitioner,

v.

FRANCES P. PONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1346

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1346

IORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,

Petitioner,

v.

FRANCES P. PONS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Frances P. Pons respectfully opposes the petition for writ of certiorari in this proceeding, seeking to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this cause on February 2, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is not yet reported, but is set out in the petition for certiorari (App. 2a-7a). The opinion of the United States District Court for the Middle District of North Carolina is reported at 69 F.R.D. 576, and 13 F.E.P.Cas. 444, and is set out in the petition for certiorari (App. 7a-12a).

JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. sec. 1254(1). The judgment of the United States Court of Appeals for the Fourth Circuit was entered on February 2, 1977. The petition for certiorari was filed within 90 days of that date.

QUESTIONS PRESENTED

Whether either the Seventh Amendment, or the Age Discrimination in Employment Act (29 U.S.C. sec. 626), requires a jury trial upon demand of one of the parties in an action under that statute for damages and injunctive relief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Seventh Amendment to the Constitution of the United States provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

2. The Age Discrimination in Employment Act, 29 U.S.C. sec. 626(b) and (c) provide in pertinent part:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided for in sec. 211(b), 216 (except for subsection (a) thereof), and 217 of this title and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided,

> That liquidated damages shall be payable only in cases of willful violation of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid mimimum wages or unpaid overtime compensation under this section.
>
> (c) Any person aggrieved may bring a civil action in any competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter:
> . . .

STATEMENT OF THE CASE

This is an action brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 621, et seq. The complaint prays for "monetary damages" consisting of wages from date of discharge to date of judgment, together with an equal amount of liquidated damages; and the complaint also requests an injunction requiring that plaintiff be reinstated

as an employee of defendant. A jury trial demand is set out in the complaint.

Defendant moved to strike plaintiff's demand for jury trial. The United States district Court for the Middle District of North Carolina entered a memorandum opinion ruling in defendant's favor and entered an order striking plaintiff's demand for jury trial. The district court certified this issue for interlocutory appeal to the United States Court of Appeals for the Fourth Circuit, and that court granted plaintiff's petition for permission to appeal.

While the case was pending in the court of appeals, plaintiff filed a motion to amend the complaint setting forth a claim for punitive damages. This motion was remanded by the court of appeals for presentation to the district court.

The United States Court of Appeals in an opinion by Senior Circuit Judge Albert V. Bryan reversed the district court, holding that plaintiff is entitled to a jury trial by virtue of the Seventh Amendment. Circuit Judge Butzner wrote a concurring opinion in which he stated his view that plaintiff's right to jury trial was derived from a construction of the Age Discrimination in Employment Act itself, and that recourse to the Seventh Amendment is not necessary.

REASONS FOR DENYING THE WRIT

THE DECISION OF THE COURT OF APPEALS WAS PLAINLY REQUIRED BY THIS COURT'S DECISION IN CURTIS v. LOETHER, 415 U.S. 189 (1974), AND A PROPER CONSTRUCTION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT ITSELF, AND SHOULD NOT BE DISTURBED.

The petition for certiorari correctly points out that the United States Court of Appeals for the Sixth Circuit has decided a case, Morelock v. NCR Corp., 546 F.2d 682 (1976), which is directly in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in this case. The decision in the present case was clearly correct and should not be disturbed, however. Should a petition for certiorari be filed in the Morelock case, that case should be summarily reversed.

The Age Discrimination in Employment Act of 1967 specifically provides for the granting of appropriate "legal or equitable relief." 29 U.S.C. sec. 626(b),(c). The enumerated specific forms of relief are, "including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid mimimum wages or unpaid overtime compensation . . ." 29 U.S.C. sec. 626(b).

Section 626(b) also incorporates by reference the private remedy provisions of the Fair Labor Standards Act, 29 U.S.C. sec. 216(b), that "Any employer who violates the provisions of section 206 or 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid mimimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."

Under section 216(b) the courts have uniformly held that there is a right to a trial by jury. McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971); Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965); Olearchick v. American Steel Foundries, 73 F.Supp. 273 (W.D.Pa. 1947); Wirtz v. Turner, 330 F.2d 11 (7th Cir. 1964).

The term "legal relief" set out in the Age Discrimination in Employment Act clearly relates to the enumerated remedy of "enforcing the liability for amounts deemed to be unpaid mimimum wages or unpaid overtime compensation under this section," and also may relate to other types of legal claims, such as common law damage claims, which are not specifically enumerated in the statute.

The Congressional intent on the question of availability of jury trial is plain from the face of the statute. Both legal and equitable relief are specifically mentioned in the section on remedies, and Congress must be deemed to have known the consistent case law rule affording jury

trials under the private remedy provision of the Fair Labor Standards Act, when that provision was incorporated by reference into the Age Discrimination in Employment Act. There is nothing inconsistent with this result to be found in the legislative history.

In contrast, Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e-5(g), refers only to injunction and similar equitable remedies and "any other equitable relief as the court deems appropriate." The legislative history of Title VII makes it clear that neither its supporters nor its opponents anticipated that jury trials would be available under this law. United States Equal Employment Opportunity Commission, Legislative History of Titles VII and XI of Civil Rights Act of 1964, pp. 2043, 2046-2050, 3379-3382, 3403-3409, 3441, 3467, 3295-3296. Petitioner would invoke several decisions of the courts of appeals holding that jury trials cannot be claimed in Title VII actions, and would argue that by analogy these authorities should be followed here. It is important to note that this Court has deliberately left open the issue of jury trials in Title VII cases. Curtis v. Loether, 415 U.S. 189, 196-197 (1974). Although there are certain similarities between the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964, there are also important differences, including markedly different agency enforcement procedures and administrative exhaustion requirements (compare 42 U.S.C. sec. 2000e-5 with 29 U.S.C. sec. 626), and the unavailability of class actions

under the Age Discrimination in Employment Act (e.g., LaChapelle v. Owen-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975)).

A jury trial must be provided in an age discrimination case, not only because Congress intended to make it available, but also because the Seventh Amendment requires it. In Ross v. Bernhard, 396 U.S. 531 (1970), and other recent cases of this Court it is established that the Seventh Amendment compels a jury trial if (1) the issue is "legal" rather than "equitable" under the custom of the courts prior to the merger of law and equity, (2) the remedy sought is legal, not equitable, and (3) the issue is triable to the jury given their practical abilities and limitations. James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655 (1963).

First, under the Age Discrimination in Employment Act, the issue is "legal" rather than "equitable" under pre-merger custom. A claim of employment discrimination with a prayer for lost wages is analogous to the common law action for breach of contract by wrongful discharge. St. Clair v. Local Union No. 515, 422 F.2d 128 (6th Cir. 1969); Ochoa v. American Oil Company, 338 F.Supp. 914 (S.D.Tex. 1972).

Second, the plaintiff is seeking a legal, not an equitable, remedy. In her complaint she prayed for monetary damages. Although plaintiff's cause of action is a statutory creature and not of common law origin, it is well established that a jury trial is available in causes of action based on modern statutes, where a claim

for legal relief is made. Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916). In addition to her prayer for monetary damages, plaintiff also requested the equitable relief of reinstatement; this does not dispossess her of her jury trial right, because "there is a right to a jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." Ross v. Bernhard, 396 U.S. at 538.

Third, the issue is within the practical abilities and limitations of the jurors. The computations of damages are governed by well established formulae, are mathematically simple, and may be reasonably estimated when the exact amount due cannot be ascertained. Wirtz v. Turner, 330 F.2d 11 (7th Cir. 1964); Neal v. Braughton, 111 F.Supp. 775 (D.Ark. 1953). Certainly age discrimination cases do not approach the complexity of accounting actions for trademark violations held to be subject to trial by jury in Dairy Queen, Inc. v. Wood, supra.

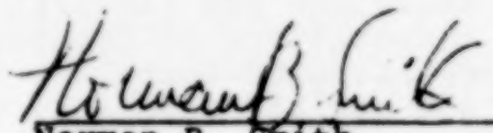
The decision of the court of appeals in the present case is particularly supported by this Court's case of Curtis v. Loether, 415 U.S. 189 (1974). This case holds that there is a Seventh Amendment jury trial right in an action brought under the Fair Housing Law, Title VIII of the Civil Rights Act, 42 U.S.C. sec. 3612, which provides for injunctive relief and both actual and punitive "damages." Relying on Dairy Queen, Inc. v. Wood, and other decisions in a long line of cases

upholding the right to jury in civil actions, the court said, "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1346

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v.

FRANCES P. PONS, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR PETITIONER, LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. for Cert., pp. 2a-7a) is reported at 549 F. 2d 950. The opinion of the District Court for the Middle District of North Carolina (Pet. for Cert., pp. 7a-12a) is unofficially reported at 69 F.R.D. 576, 13 FEP Cases 444.

JURISDICTION

The judgment of the Court of Appeals was entered on 2 February 1977, vacating the judgment of the District Court and remanding same for further proceedings (Pet. for Cert., p. 1a). Lorillard, a division of Loew's Theatres, Inc. ("Lorillard"), defendant in the District Court and respondent in the Court of Appeals, filed a Petition for a Writ of Certiorari on 31 March 1977. On 27 June 1977, the Court granted the Petition for Certiorari. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The relevant statutory provisions are §§ 4 and 7 of the Age Discrimination in Employment Act of 1967 ("ADEA") (81 Stat. 602, 29 U.S.C. §§ 621, et seq.) and are set forth in the Appendix to this Brief, infra, pp. 1a-3a; Fair Labor Standards Act of 1938, as amended ("FLSA"), §§ 11(b), 15, 16 and 17 (App., infra, pp. 4a-5a); Title VII of the Civil Rights Act of 1964 ("Title VII"), §§ 703-706 (App., infra, pp. 6a-8a).

QUESTION PRESENTED

Whether the Seventh Amendment, or the ADEA, requires a jury trial upon demand of one of the parties in an action for injunctive relief and back wages under that Act.

STATEMENT

In September 1975, a complaint was filed against petitioner Lorillard in the United States District Court for the Middle District of North Carolina, in which it was alleged that respondent, a former employee of Lorillard, was terminated by her employer when she was forty-eight years of age and holding the position of financial services coordinator, as a part of its policy to discharge older employees and to retain young people as employees wherever possible (App. 3-4). In her complaint, respondent sought injunctive reinstatement as an employee, and thereafter not to discriminate against her because of her age, monetary damages consisting of lost wages from date of discharge to date of judgment, together with an equal amount of liquidated damages, costs and attorneys' fees (App. 4).

Respondent's complaint was accompanied by a timely written demand for trial by jury on all issues of fact in the action (App. 5). On Lorillard's motion to strike respondent's jury trial demand, the District Court ordered that respondent's demand for a jury trial be stricken and that the action be placed on the non-jury calender (App. 10). The order was accompanied by a Memorandum Opinion (Pet. for Cert., pp. 7a-12a). In its opinion of January 21, 1976, the District Court held that respondent's Seventh Amendment right to jury trial turns upon the lost wages issue,

noting that she "makes no argument that the other issues[1] will support trial by jury, and there is no authority to support such an argument." The District Court considered that actions for lost wages under the ADEA are logically analogous to actions under Title VII of the Civil Rights Act of 1964, the employment discrimination provisions of the Act, and observed that the Courts of Appeals for the Fourth, Fifth, Sixth and Ninth Circuits have found an award of back pay under Title VII to be equitable. *Pons* v. *Lorillard,* 69 F.R.D. 576; Pet. for Cert., pp. 7a-12a.[2]

An interelocutory appeal of the District Court order to the Court of Appeals was allowed. 28 U.S.C. § 1292(b), FRAP 5.

While the case was pending in the Court of Appeals, and prior to oral argument, respondent filed a motion in that court for leave to amend her complaint upon remand to the District Court, by adding a new paragraph alleging that "by discriminating against plaintiff, defendant acted purposefully and intentionally, willfully, wantonly, oppressively and with a reckless

[1] Referring to plaintiff's injunctive reinstatement, liquidated damages, attorneys' fees and costs. The District Court noted that "in the hearing on the defendant's Motion to strike the jury demand, plaintiff candidly conceded that the liquidated damages issue would not be triable to a jury." Pet. for Cert., pp. 7a-8a, n. 2. See also *Pons* v. *Lorillard*, 549 F.2d 950, 951, n. 3.

[2] Other cases holding that parties to an ADEA action are not entitled to a jury trial are *Morelock* v. *NCR Corp.*, 546 F.2d 682 (6th Cir. 1976), Pet. for Cert., pp. 12a-19a; *Looney* v. *Commercial Union Assurance Cos.*, 428 F. Supp. 533 (E.D. Mich. 1977); *Hannon* v. *Continental National Bank*, 427 F. Supp. 215 (D. Colo. 1977); *Polstorff* v. *Fletcher*, 14 FEP Cases 1638 (N.D. Ala. 1977); *Brennan* v. *International Harvester Co.*, 7 Empl. Prac. Dec. ¶ 9171 (N.D. Ill. 1974).

disregard of plaintiff's rights;" and that "in addition to loss of wages, plaintiff has suffered depression and anxiety, and humiliation and embarrassment proximately and directly as a result of defendant's wrongful conduct;" and praying for relief and that the Court "award plaintiff monetary damages consisting of lost wages and all of her other actual damages, statutory liquidated damages, and common law punitive damages" (App. 11-12). Lorillard responded by opposing this motion and took the position that any motion to amend the complaint should be filed with the District Court upon remand, and was not properly presented to the Court of Appeals, and that the motion failed to adequately state the grounds on which it was based (App. 13-18).

The Court of Appeals vacated the District Court's order, holding that the jury demand should not have been denied, and remanding the claim for back pay for trial by a jury; it also remanded respondent's motion to amend her complaint to include a claim for punitive damages for presentation to the District Court (Pet. for Cert., p. 6a, n. 7).

The Court of Appeals vacated the order of the District Court and remanded the claim for back pay for trial by a jury in an analysis as follows: First, Congress intended by the inclusion of the phrase "legal . . . relief" in Sections 7(b) and 7(c) of the ADEA (App., infra, 2a-3a) to empower a federal court to grant litigants the right to a jury trial. Second, the enforcement provisions of the ADEA—fair age employment—are different from those of Title VII—fair employment—but are not different from the enforcement clauses of Title VIII—fair housing—as construed in *Curtis* v. *Loether,* 415 U. S. 189 (1974). Third, the terms of the

ADEA command a jury trial in claims for lost wages because its enforcement section incorporates by reference the enforcement remedies of § 216(b) of the FLSA, and same uniformly are accorded a jury trial. Fourth, an ADEA claim for lost wages meets the three-pronged test enunciated by this Court in *Ross* v. *Bernhard*, 396 U. S. 531, 538 (1970), concluding that ADEA claims for lost wages are analogous to the common law action for breach of contract by wrongful discharge or by an action in tort. *Pons* v. *Lorillard*, 549 F. 2d 950 (1977), Pet. for Cert., pp. 2a-7a.[3]

ARGUMENT

I. Congressional Intent as to ADEA Actions Does Not Require Jury Trial

Congress passed the ADEA to ensure that hiring or termination decisions are based on obvious evaluations of individuals' potential for job performance, rather than on misconceptions about the effects of age on ability. Its statutory purpose is to promote "employment of older persons based on their ability rather than age; to prohibit arbitrary discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1970).

[3] Other cases holding that parties to an ADEA action are entitled to a jury trial are: *Rogers* v. *Exxon Research and Engineering Co.*, 550 F.2d 834 (3rd Cir. 1977); *Wilson* v. *Sealtest Foods Div. of Kraftco Corp.*, 501 F.2d 84, 86, n. 4 (5th Cir. 1974); *Bertrand* v. *Orkin Exterminating Co., Inc.*, 419 F. Supp. 1123 (N.D. Ill. 1976); *Chilton* v. *National Cash Register Co.*, 370 F. Supp. 660 (S.D. Ohio 1974); *Murphy* v. *American Motors Sales Corp.*, 410 F. Supp. 1403 (N.D. Ga. 1976); *Cleverly* v. *Western Electric Co.*, 69 FRD 348, 13 FEP Cases 1443 (W.D. Mo. 1975).

As the ADEA was enacted in 1967, Congress could have amended Title VII of the Civil Rights Act of 1964, which proscribes employment discrimination on the basis of race, sex, religion or national origin to include age as a protected classification since the prohibitions in both Acts are substantially the same. The ADEA was established as an independent statutory scheme incorporating the enforcement procedures of the Fair Labor Standards Act. One of the considerations for this choice was administrative convenience, namely, the feeling in Congress that the Equal Employment Opportunity Commission, which had been created to process complaints from aggrieved parties under Title VII, was overburdened and that age discrimination complaints could be handled more efficiently by the Wage and Hour Division of the Department of Labor.[4]

The focus of the ADEA, like Title VII, is to insure the employment of individuals without regard to arbitrary, and therefore, forbidden criteria.

The operative enforcement provisions of the two Acts are quite similar. The ADEA gives "the Court . . . jurisdiction to grant such legal or equitable relief

[4] See 113 Cong. Rec. 31254 (1967) (remarks of Sen. Javits, co-sponsor of the Senate version of the bill); *Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the Gen. Subcomm. on Labor of the House Comm. on Educ. and Labor*, 90th Cong., 1st Sess. 141-43, 412-14 (1967). See also, First Annual Report, Equal Employment Opportunity Commission to Congress, in accordance with § 705(d) of the Civil Rights Act of 1964, for the fiscal year ended June 30, 1966, noting that "by June, 1966, the Commission had been deluged with 8,854 individual complaints" (p. 5). In the Second Annual Report, for the fiscal year ended June 30, 1967, there were a total of 12,927 charges awaiting disposition (p. 4).

as may be appropriate," while Title VII provides that "the court . . . may order such affirmative action as may be appropriate." In providing examples of appropriate relief, the statutes give the same remedies—employment or hiring, reinstatement, and back pay; and each statute specifically provides that relief is not restricted to the enumerated examples.

The substantive and procedural provisions of the ADEA and Title VII are similar. The Secretary of Labor is empowered to bring an action on behalf of an aggrieved party under the ADEA, 29 U.S.C. § 626(b) (1970), while the Equal Employment Opportunity Commission is empowered to bring an action on behalf of an aggrieved party under Title VII, 42 U.S.C. § 2000e-5(f)(2).

The ADEA, like Title VII with respect to all traits but race, provides that it shall not be unlawful for an employer to base his decisions on age "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1); 42 U.S.C. § 2000e-3(b).

ADEA courts have recognized the similarity between the two Acts in interpreting the former. *Curry* v. *Continental Airlines,* 513 F. 2d 691 (9th Cir. 1975); *Moses* v. *Falstaff Brewing Corp.,* 525 F. 2d 92 (8th Cir. 1975); *Hodgson* v. *First Federal Savings & Loan Assn.,* 455 F. 2d 818, 822 (5th Cir. 1972).

The threshold determination should be made as to whether the ADEA provided, or whether Congress intended that it provide, for a jury trial. Only if the Act does not so provide does the Court reach the question of the Seventh Amendment's applicability. *Pernell* v. *Southall Realty,* 416 U. S. 363, 365 (1974).

The ADEA contains no express or implied provision concerning the right to a jury trial for alleged violations of the Act.[5]

The Act's meager legislative history does not reveal that Congress contemplated or intended that issues be tried to juries. While the right to jury trial was mentioned occasionally and some members of Congress assumed that juries would hear ADEA cases,[6] none of these references clearly indicate congressional intent on the subject.

Title VII of the Civil Rights Act of 1964 had been in effect for three years at the time of the enactment of the ADEA, and congressional concern over jury trial in the civil rights area was manifest prior to the adoption of the ADEA. See, e.g., *Hearings on Miscellaneous Proposals Regarding Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary,* 89th Cong., 2d Sess., ser. 16, at 1183 (1966).

Title VII's express preservation of the right to jury trial in criminal contempt cases, 42 U.S.C. § 2000h (1970), suggests that Congress did not provide jury trials for civil violations of Title VII or for its progenitor, ADEA actions. The ADEA draws the bulk of its statutory heritage from Title VII. The Court in

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[5] For federal statutes which specifically confer the right of jury trial, see e.g., 28 U.S.C. § 2402 (civil actions for internal revenue tax refunds); 28 U.S.C. § 2713 (actions of attachment in postal suits involving debts of defaulting postmasters, contractors or other post office employees); 46 U.S.C. § 688 (actions by seamen for injury or death under Jones Act); 7 U.S.C. § 135g (actions for violations of labeling and purity of insecticides).

[6] In a colloquy on the floor, Senator Javits said that in an age discrimination suit "a jury will answer Yes or No," 113 Cong. Rec. 31255 (1967).

Morelock v. *NCR Corp.*, 546 F. 2d 682 (6th Cir. 1976), characterized the ADEA as "an offspring of the Civil Rights Act of 1964" and noted that the similarities between the two Acts were "hardly accidental." Id., at 686. The legislative history of the ADEA and Title VII demonstrates that although the express enforcement provisions of these Acts differ, the provisions of each Act originated in the National Labor Relations Act and were respectively modified in order to permit individuals to seek relief through civil litigation. See H. R. Rep. No. 805, 1967 U. S. *Code Cong. and Admin. News*, pp. 2213, 2218.

II. ADEA Rights and Remedies Are Beyond the Seventh Amendment Ambit

As Congress has not expressly provided a jury trial under the ADEA, the matter is governed by the Seventh Amendment. The Amendment's deceptively simple language belies the problems involved in its application to the circumstances of a particular case.

The extent of the problems presented by the Seventh Amendment's guarantee since its adoption in 1791 is demonstrated by this Court's occasion to interpret the Amendment in 94 opinions, from *Bank of Hamilton* v. *Dudley's Lessee*, 27 U. S. 492 (1829), where the basic principle was first articulated, to *Pernell* v. *Southall Realty*, 416 U. S. 363 (1974). The problem of ascertaining whether a particular action is legal or equitable continues to perplex the courts; only the tests have changed.

The basic principle to be applied was set forth by Mr. Justice Marshall in *Curtis* v. *Loether*, 415 U. S. 189, 194-195 (1974):

> "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, *if the statute creates legal rights and remedies, enforceable in an action for damages* in the ordinary courts of law. . . . But when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts where there is obviously no functional justification for denying the jury trial right, a jury trial must be available *if the action involves rights and remedies of the sort typically enforced in an action at law.*" Id., at 194-195 (footnote omitted) (emphasis added).

This principle was also restated in *Pernell* v. *Southall Realty*, 416 U. S. 363, 374-376 (1974);

> "Whether or not a close equivalent to Section 16-1501 existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, *provided that the action involves rights and remedies of the sort traditionally enforced in an action at law*, rather than in an action at equity or admiralty." 416 U. S. at 375 (emphasis added).

The entire area of constitutional right to jury trial in employment discrimination actions is confusing and confused. This Court has not previously had occasion to determine whether the rights and remedies created by acts relating to discrimination in employment are of the sort traditionally involved in an action at equity or in law. As discussed later in this Brief, reference is made to the problem in *Curtis* v. *Loether*, *supra*, but it was stated that "we of course express no view on the jury trial issue" in the Title VII context, and also to Mr. Justice Rehnquist's concurring opinion in Albemarle Paper Co. v. Moody, 422 U. S. 405, at 441 (1974).

A. The test of history

Because the Seventh Amendment seeks to *preserve* an existing standard for determining the scope of the right to jury trial rather than to establish a new standard, this Court has suggested in *Ross* v. *Bernhard* that an historical approach to the question is one element of a three-pronged inquiry:

> "[T]he 'legal nature' of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." 396 U.S. at 538, n. 10 (1970).

Stated differently:

> "Where a new cause of action is created by Congress, and nothing is said about how it is to be tried, the jury trial issue is determined by fitting the cause into its nearest historical analogy." 396 U. S. at 543, n. 1 (Stewart, J., dissenting).

The Court of Appeals in the case under review relied upon the rationale of *Ross*, stating that "the ultimate analysis to determine whether a suit is one 'at common law' within the Amendment seems to be the three-pronged classical test" and concluding that the present action met such a test (Pet. for Cert., pp. 5a-6a). The *Ross* test was cited in *Curtis*, 415 U. S. at 194, 195.

The nature of the "remedy" element in the *Ross* test has reference to history. Traditionally, actions for money damages for tort or breach of contract were legal, while actions for injunction or for specific performance were invariably equitable. This difference in the relief granted remains the most obvious ground for differentiating law and equity. Debatable questions arise where, as in the case under review, money is requested by respondent, and it is the kind of money award which could have been granted by equity. Although *Ross* involved a situation in which a statutorily created right of action was being asserted, it did not deal with the process of finding a legal or equitable characterization for the statutory right.

As pointed out by Mr. Justice Stewart in his dissenting opinion in *Ross* (with whom Mr. Chief Justice Berger and Mr. Justice Harlan joined), "[t]he fact is, of course, that there are, for the most part, no such things as inherently 'legal issues' or inherently 'equitable issues.' There are only factual issues, and, 'like chameleons [they] take their color from surrounding circumstances.'" 396 U. S. at 550 (footnote omitted).

Because the Seventh Amendment is preservative in character and neither enlarges nor restricts the right of jury trial as it was known to the English common law at the time the Amendment was adopted in 1791, the historical test has proven to be an unsatisfactory means of resolving the jury trial issue. The *Ross* test appears to offer no improvements over the strict historical test, merely breaking the historical test into components without eliminating any of its unsatisfactory attributes.

B. Judicial precedent mandates non-jury trial

Even if it be determined that respondent's action under ADEA to redress her claimed employment discrimination is an action presenting a "right" of the sort traditionally enforced in an action at law does not, in itself, mandate a right to jury trial. The Seventh Amendment does not apply unless the action involves rights *and* remedies of the requisite nature. *Curtis* v. *Loether* and *Pernell* v. *Southall Realty, ante,* p. 11.

Accordingly, an analysis of the right to jury trial under ADEA should be made in terms of the existing case law—however unsatisfactory the basis of this case law may be conceptually. An examination of the judicial handling of the jury trial issue under similar remedial statutes which, like ADEA, involve both injunctive relief and monetary awards reveals that the courts have consistently denied the right to jury trial in such actions. Almost without exception, courts have denied the right to jury trial in employment discrimination cases when a plaintiff seeks injunctive relief and back pay as in the present action. This Court noted in *Curtis* v. *Loether*, 415 U. S. at 196-7, that in Title VII actions, "the courts of appeals have held that jury trial is not required in an action for reinstatement and back pay," citing *Johnson* v. *Georgia Highway Express, Inc.*, 417 F. 2d 1122 (5th Cir. 1969); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), cert. dismissed under Rule 60, 404 U. S. 1006 (1971); *McFerren* v. *County Board of Education*, 455 F. 2d 199 (6th Cir. 1972); *Harkless* v. *Sweeney Independent School District*, 427 F. 2d 319 (5th Cir. 1970), cert. denied, 400 U. S. 991 (1971); *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577 (4th Cir. 1966) (en banc).

1. *Title VII Cases*

The Court in *Curtis* noted that "in Title VII cases the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution;" and that those courts also "have relied on the fact that the decisions whether to award backpay is committed to the discretion of the trial judge;" and finally, that in a sense the award in those cases could

be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff. 415 U. S. at 197.

Subsequent to *Curtis*, this Court has had occasion to examine more closely the nature of a back-pay award in Title VII actions by private individuals. In *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405 (1975), one of the issues involved was what standards should a federal district court follow in deciding whether to award or deny back pay to employees who have lost the opportunity to earn wages because an employer has engaged in an unlawful discriminatory employment practice. The Court stated:

> "... It is true that backpay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are of course left in the first instance to the district courts. ..." 422 U. S. at 415-416 (footnote omitted).

It was noted that the district court's discretion in Title VII cases "is equitable in nature, see Curtis v. Loether, 415 U. S. 189, 197" and that "Congress invokes the Chancellor's conscience to further transcendant legislative purposes" in employment discrimination litigation. This Court in *Albemarle* employed language that is equally apposite to actions brought by private individuals under the ADEA for injuries occasioned by age discrimination:

> "It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is

shown by the very fact that Congress took care to arm the courts with full equitable powers. For it is the historic purpose of equity to 'secur[e] complete justice,' *Brown* v. *Swann,* 10 Pet. 497, 503; see also *Porter* v. *Warner Holding Co.,* 328 U. S. 395, 397-398. '[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' *Bell* v. *Hood,* 327 U. S. 678, 684. Title VII deals with legal injuries of an economic character occasioned by racial or other anti-minority discrimination. The terms 'complete justice' and 'necessary relief' have acquired a clear meaning in such circumstances. Where racial discrimination is concerned, 'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.' *Louisiana* v. *United States,* 380 U. S. 145, 154. And where a legal injury is of an economic character,

> '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed as near as may be, in the situation he would have occupied if the wrong had not been committed.' *Wicker* v. *Hoppock,* 6 Wall. 94, at 99." 422 U. S. at 416-419.

And Mr. Justice Rehnquist's words concerning the discretionary nature of an employment award is instructive:

> "To the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay not withstanding a finding of unlawful discrimination, the nature of the jurisdiction which the Court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the Court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment." 422 U. S. at 443.

In *Franks* v. *Bowman Transportation Co.,* 424 U. S. 747 (1976), involving the question of whether identifiable applicants who were denied employment because of race in violation of Title VII may be awarded seniority status retroactive to the dates of their employment applications, it is stated, with respect to Title VII, that "federal courts are empowered to fashion such relief as the particular circumstances of a case may require to *effect restitution,* making whole insofar as possible the victims of racial discrimination in hiring." 424 U. S. at 764 (emphasis added).

The Court also stated:

> "We are not to be understood as holding that an award of seniority status is requisite in all circumstances. The fashioning of appropriate remedies invokes the sound equitable discretion of the district courts." 424 U. S. at 770.[7]

2. *NLRA Cases*

The question whether the trial of a former employee, who claims to have been discriminatorily terminated, without a jury violates the Seventh Amendment arose

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[7] "When a district court orders an award of back pay or retroactive seniority, it exercises equitable powers expressly conferred upon it by Congress." 424 U.S. at 785 (Powell, J., dissenting).

in this Court in the context of a proceeding for reinstatement and back pay under the National Labor Relations Act. *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1 (1936). There, an order of the NLRB which, in addition to directing reinstatement of unlawfully discharged employees, also directed back pay to these employees, was held not to violate the Seventh Amendment. The decision was rested on the ground that the case was not a suit at common law or in the nature of such a suit, and that the proceeding was one unknown to the common law. Mr. Chief Justice Hughes, writing for a majority composed of Justices Brandeis, Stone, Roberts, and Cardozo, rejected the employer's argument that the backpay "requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury," stating:

> ". . . Thus [the Seventh Amendment] has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law. . . . It does not apply where the proceeding is not in the nature of a suit at common law. . . .
>
> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit."

The holdings of the Court in *Jones & Laughlin* were followed in *Associated Press* v. *NLRB*, 301 U. S. 103, 133 (1937), and *NLRB* v. *Mackay Radio and Tel. Co.*, 304 U. S. 333, 351 (1938).

The character of *Jones & Laughlin* was explained, and its rationale was limited, in *Curtis* v. *Loether*, 415 U. S. 189, 194 (1974), where the Court noted that in the former case the Seventh Amendment claim was rejected on the ground that the case involved a statutory proceeding and not a suit at common law or in the nature of such a suit; and that the case merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme.

Even though *Jones & Laughlin's* ultimate rationale was grounded in the fact that an administrative proceeding was involved, the decision has obvious Seventh Amendment wording and overtones which have not been overturned or lessened; and this Court has neither rejected nor denigrated in any way the reasoning in *Jones & Laughlin* that the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law."

3. *FLSA Cases*

The Court noted in *Curtis*, 415 U. S. at 196, that "we need not, and do not, go so far as to say that any award of monetary relief must necessarily be legal relief. See, e.g., *Mitchell* v. *De Mario Jewelry, Inc.*, 361 U. S. 288 (1960); *Porter* v. *Warner Holding Co.*, 328 U. S. 395 (1946)" (footnote omitted).

Mitchell v. *De Mario Jewelry* involves a suit brought by the Secretary of Labor in the District Court to en-

join violations of § 15(a)(3) of the Fair Labor Standards Act of 1938, which makes it unlawful for an employer to discharge or discriminate against an employee because the employee has instituted a proceeding under the Act. The District Court granted an injunction against further discrimination and ordered reinstatement of three employees, but declined, without deciding whether it had jurisdiction, to order the employer to reimburse the employees for wages lost as a consequence of the unlawful discharge.

This Court reversed the judgment below and held, in the face of a silent statute, that district courts enjoyed the "historic power of equity" to award reimbursement of lost wages even though § 17 of the Act as then framed withdrew from the Court jurisdiction, in an action to restrain violations of the Act, payment to employees of "unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action." The Court concluded:

> "When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." 361 U. S. at 291-2.

The Court reasoned that the remedy of ordering reimbursement for loss of wages is not punitive, where the measure of reimbursement is compensatory only. Id., at 293.

In *Mitchell*, a Seventh Amendment jury trial right was not asserted directly, but the Court relied on equity's historical justifications for asserting its implied jurisdiction, strongly suggesting that no jury trial right would attach. Particularly the ruling in *Mitchell*, falling chronologically between *Beacon Theatres* v. *Westover*, 359 U. S. 500 (1959), and *Dairy Queen, Inc.* v. *Wood.*, 369 U. S. 469 (1962), must have been cognizant of the jury trial implications of relying entirely on an equitable rationale for granting monetary relief.

Suits brought under § 17 of the Fair Labor Standards Act of 1938, 29 U.S.C. § 217, provide another example of a proceeding in which monetary awards combined with injunctive relief are available without a right to jury trial. *Paradise Valley Investigation and Patrol Services, Inc.* v. *Dunlop*, 521 F. 2d 1342 (9th Cir. 1975); *Wirtz* v. *Jones*, 340 F. 2d 901 (5th Cir. 1965).

The Court of Appeals considered that since § 626(b) of the ADEA incorporated the provisions of § 216 of the FLSA [see App., infra., p. 4a-5a] and that "it is settled that § 216(b) claims are legal in nature and uniformly accorded a jury trial" (Pet. for Cert., p. 5a), it follows that a private party bringing an action under ADEA is similarly entitled to a jury trial. This Court has never ruled on the issue of whether a private party under an FLSA suit is entitled to a jury trial, but assuming arguendo that he is entitled to same, that fact is not dispositive of the instant issue involved because private actions requiring jury trials under the FLSA do not, as do ADEA and Title VII proceedings, involve injunctive relief; only monetary relief is provided by the FLSA. Individual employees may not seek equitable relief in FLSA cases. *Powell* v. *Washington Post Co.*, 267 F. 2d 651 (D.C. Cir. 1959), and *Roberg* v. *Phipps*, 156 F. 2d 958 (2nd Cir. 1946). It is, there-

fore, seen that the right to jury trial does not depend simply on whether a private individual or a public official brings the action under the FLSA but it is a question of the type of remedy sought by the action. Accordingly, while there is no jury trial right when the Secretary of Labor seeks an injunction and the payment of back wages under § 17 of the FLSA, *Sullivan* v. *Wirtz*, 359 F. 2d 426 (5th Cir. 1966), cert denied 385 U. S. 852 (1966), the courts have also held that there is a right to jury trial when the Secretary of Labor brings an action under § 16(c) for purely monetary relief, *Wirtz* v. *Turner*, 330 F. 2d 11 (7th Cir. 1964).

Because the enforcement provisions of the ADEA incorporate by reference the provisions of the FLSA and utilize the administrative and enforcement machinery of that Act, it does not follow that the decisions dealing with jury rights in private actions under the FLSA apply equally to those under the ADEA. ADEA is a separate law, enacted at a different time, and aimed at a separate problem—discrimination on account of age in employment situations. *Cf., Usery* v. *Allegheny County Institution Dist.*, 544 F. 2d 148 (3rd Cir. 1976), holding that the Equal Pay Act is separate from the FLSA even though it is housed in the latter Act.

Relief under § 626 of the ADEA is "within the equitable discretion of the district court," *Brennan* v. *Ace Hardware Corp.*, 495 F. 2d 368 (8th Cir. 1974), whereas relief under the FLSA is automatic and represents the difference between the amount of minimum wages due under the Act and the amount paid by the employer (or the payment of time and a half times the regular rate of pay for overtime hours worked and not compensated for). This contrast highlights both the "equitable nature" of private ADEA relief and supports the conclusion that actions by individuals

under ADEA are more closely analogous to actions by government officials under FLSA than to private actions under this statute.

For a complete analysis of the relationship between a private action brought under the FLSA and one under the ADEA, reference is made to *Morelock* v. *NCR Corp.*, 546 F. 2d 682 (6th Cir. 1976) (Pet. for Cert., pp. 12a-19a).

Both the ADEA and the FLSA provide for "liquidated damages" in cases of willful violations of the Act (App., infra, pp. 2a-3a). The award of liquidated damages, however, is a matter within the discretion of the district court by reason of the provisions of § 11 of the Portal-to-Portal Act of 1947, 29 U.S.C. § 260. *Hays* v. *Republic Steel Corp.*, 531 F. 2d 1307 (5th Cir. 1976), held that the district court in an ADEA action by individuals against an employer has discretion, pursuant to the provisions of the Portal-to-Portal Act, to not award liquidated damages where there is a willful violation of the Act but good faith on the part of the employer has been established. Similarly, in *Richard* v. *Marriott Corp.*, 549 F. 2d 303 (4th Cir. 1977), an action brought by individuals under the Fair Labor Standards Act for denial of the federal minimum wages, the court held that § 16(b) of the FLSA which provides for the payment of unpaid minimum wages and "an additional equal amount as liquidated damages," permits the district court "in its further discretion," to award a lesser amount of liquidated damages, or none at all, if the employer shows to the satisfaction of the court that the act giving rise to such action was in good faith and that he had reasonable grounds for believing that his act was not a violation of the FLSA.

4. *Section 1983 Cases*

It is true, as noted by the Court of Appeals (Pet. for Cert., p. 3a) that § 4(b) and (c) of the ADEA vests the district court with jurisdiction to grant "legal *or* equitable relief." The court below concluded that "the inclusion of the phrase 'legal . . . relief' empowers a Federal court to grant complainants the Constitutional right to a jury" (Pet. for Cert., p. 3a), presumably equating this language with vesting the district court with the right to grant both legal and equitable remedies. We consider that the Congressional draftsmen of the ADEA had no such purpose in mind. The phraseology "legal *or* equitable relief" is meant to indicate that an individual plaintiff in an ADEA case can, unlike an individual plaintiff in an FLSA case, seek legal relief in the form of back pay *or* injunctive relief in the form of reinstatement which would not be the situation under an FLSA action.

Analogous is the phraseology of 42 U.S.C. § 1983 which provides that persons who have been deprived of rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured "in an action at law, suit in equity *or* other proceeding for redress."[9]

The courts in *Harkless* v. *Sweeny Independent School Dist.*, 427 F. 2d 319 (5th Cir. 1970), cert. denied

[9] 42 U.S.C. § 1983 (1970) provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

400 U. S. 991 (1971), and *Smith* v. *Hampton Training School for Nurses*, 360 F. 2d 577 (4th Cir. 1966) (en banc), considered that the equitable relief authorized by § 1983 was intended to be comprehensive and held that no jury trial rights attach to the back-pay issue. In *Smith*, the court dealt with plaintiff Negro nurses who had been discharged for eating in a cafeteria reserved by the hospital administration exclusively for whites. The court, relying only on § 1983, quoted that part of it authorizing suits in equity or other proper proceedings and held that where, as in *Smith*, the nurses were dismissed for protesting illegal discrimination, they were entitled to return to their jobs and that equity would restore them to their previous position by means of a back-pay order. The opinion's central concern was with the suitability of providing that relief under the statute. In a footnote disposing of the jury-trial issue, the court cited *NLRB* v. *Jones & Laughlin*, 301 U. S. 1 (1936) and *Agwilines* v. *NLRB*, 87 F. 2d 146 (5th Cir. 1936), for the proposition that a back-pay order forms an integral part of the equitable relief of reinstatement and that no jury trial rights attached.

See, *Cox* v. *Northern Virginia Transp. Commission*, 551 F. 2d 555 (4th Cir. 1976), an action brought under 42 U.S.C. § 1983, where it was held that "'back pay is an integral component of the equitable relief to which the employee is entitled" and plaintiff was not permitted to recover either punitive or compensatory damages for injury to her reputation. *Cf.*, *Paul* v. *Davis*, 424 U. S. 693 (1976), an action brought under 42 U.S.C. § 1983, where it was held that defamation by a state official is not a federal constitutional or statutory tort.

C. This case is not controlled by the Court's holding in *Curtis* v. *Loether*

Reliance upon the holding of this Court in *Curtis* v. *Loether*, 415 U. S. 189 (1974), for a jury trial in an ADEA action is misplaced. An effort to force the facts of this case and the provisions of the ADEA into the mold of *Curtis* simply will not succeed. There are significant differences between the statutory language authorizing remedial relief in Title VIII suits and ADEA suits.

Title VIII authorizes private plaintiffs to bring civil actions to redress violations of the fair housing provisions of that Act, and provides that

> "[t]he court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and *may award to the plaintiff actual damages and not more than $1,000 punitive damages*, together with court costs and reasonable attorney fees. . . ." 42 U.S.C. § 3612 (emphasis added).

The contrast between the two Acts is striking. Title VIII clearly permits a party to seek legal relief and Congress characterized it as such. In contrast, however, the inference from the wording of ADEA is that Congress contemplated only equitable relief and hence the award of any monetary relief can only be viewed as part of that equitable remedy.

The Court stated in *Curtis*:

> "More important, the relief sought here—actual and punitive damages—is the traditional form of relief offered in the courts of law." 415 U. S. at 196 (footnote omitted).

Title VIII expressly provides for the recovery of actual and punitive damages. Actions in equity refuse to enforce a penalty and will not award punitive damages. *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. 27 (1916). Title VIII actions also authorize the recovery of actual damages as measured by a plaintiff's loss. In contrast, an action under ADEA cannot award punitive damages, and can only restore the status quo or make a restitutionary award. Thus, it was held in *Rogers* v. *Exxon Research and Engineering Co.*, 550 F. 2d 834 (3rd Cir. 1977), that an action by a former employee against his employer to recover for alleged age discrimination under the ADEA did not permit recovery of damages for pain and suffering or emotional and psychic distress, and that the Act provides for only the amount of lost earnings.

The Court in *Curtis*, while expressing no view on the jury-trial issue in a Title VII context, did deem a comparison of Title VIII with Title VII to be "instructive," and noticed the sharp contrast between the statutory language in Title VII under which the courts of appeals have characterized back pay "as an integral part of an equitable remedy, a form of restitution" with Title VIII's "simple authorization of an action for actual and punitive damages." Id., at 197.

Curtis also noted that in Title VII cases the courts "have relied on the fact that the decision whether to award back pay is committed to the discretion of the trial judge" which contracts with Title VIII where "[t]here is no comparable discretion here: if a plaintiff proves unlawful discrimination and actual damages, he is entitled to judgment for that amount." Id., at 197.

Finally, *Curtis* notes the distinction that Title VII cases can be viewed as requiring the employer to disgorge funds wrongfully withheld from the plaintiff, e.g., *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971), cert. dismissed under Rule 60, 404 U. S. 1006 (1971), but in actions under Title VIII there is no "sense in which the award here can be viewed as requiring the defendant to disgorge funds wrongfully withheld from the plaintiff." Id., at 197.

CONCLUSION

The ADEA contains no express or implied provision concerning the right to a jury trial for alleged violations of the Act. The Act's meager legislative history does not reveal whether Congress contemplated or intended that issues be tried to juries. The action brought by respondent in this case involves rights and remedies of the sort traditionally enforced in an action at equity, rather than one at law, and, therefore, is not within the ambit of the Seventh Amendment.

Actions under the ADEA for employment discrimination on account of age are similar to actions brought under Title VII of the Civil Rights Act of 1964 for alleged discrimination on account of sex, race or national origin. The courts of appeals have uniformly held that a jury trial is not required in an action for reinstatement and back pay in Title VII actions, and the same result should follow in ADEA actions.

We urge, therefore, that the judgment of the court below be reversed, and that the judgment of the District Court striking respondent's demand for jury trial be stricken and that the action be placed on a non-jury calender, be reinstated.

Respectfully submitted,

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Dated: September 1977

APPENDIX

APPENDIX

Age Discrimination in Employment Act of 1967. As Amended

(29 U.S.C. 621, et seq., 81 Stat. 602, December 15, 1967)

• • •

PROHIBITION OF AGE DISCRIMINATION

SEC. 4. [29 U.S.C. § 623] (a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

• • •

(d) It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this Act.

• • •

(f) It shall not be lawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual; or

(3) to discharge or otherwise discipline an individual for good cause.

• • •

ENFORCEMENT

SEC. 7. [29 U.S.C. § 626] . . . .

• • •

(b) The provisions of this Act shall be enforced in accordance with the powers, remedies, and procedures provided in sections 11(b), 16 (except for subsection (a) thereof), and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 211(b), 216, 217), and subsection (c) of this section. Any act prohibited under section 4 of this Act shall be deemed to be a prohibited act under section 15 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 215). Amounts owing to a person as a result of a violation of this Act shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 16 and 17 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216, 217): *Provided*, That liquidated damages shall be payable only in cases of willful violations

of this Act. In any action brought to enforce this Act the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Act, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with requirements of this Act through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act; *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this Act.

• • •

(e) Sections 6 and 10 of the Portal-to-Portal Act of 1947 shall apply to actions under this Act.

• • •

LIMITATION

SEC. 12. [29 U.S.C. § 631] The prohibitions in this Act shall be limited to individuals who are at least forty years of age but less than sixty-five years of age.

Fair Labor Standards Act of 1938, As Amended

(29 U.S.C. 201, et seq., 52 Stat. 1060, June 25, 1938;
75 Stat. 65, May 5, 1961)

* * *

Investigations, Inspections, Records, and Homework Regulations

SEC. 11. [29 U.S.C. § 211] . . . .

* * *

(b) With the consent and cooperation of State agencies charged with the administration of State labor laws, the Secretary of Labor may, for the purpose of carrying out his functions and duties under this Act, utilize the services of State and local agencies and their employees and, notwithstanding any other provision of law, may reimburse such State and local agencies and their employees for services rendered for such purposes.

* * *

Prohibited Acts

SEC. 15. [29 U.S.C. § 215] (a) After the expiration of one hundred and twenty days from the date of enactment of this Act, it shall be unlawful for any person—

* * *

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Secretary issued under section 14;

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * *

Penalties

SEC. 16. [29 U.S.C. § 216] (a) Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

* * *

Injunction Proceedings

SEC. 17. [29 U.S.C. § 217] The district courts, together with the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands, and the District Court of Guam shall have jurisdiction, for cause shown, to restrain violations of section 15, including in the case of violations of section 15(a)(2) the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this Act (except sums which employees are barred from recovering, at the time of the commencement of the action to restrain the violations, by virtue of the provisions of section 6 of the Portal-to-Portal Act of 1947).

Title VII of Civil Rights Act of 1964

(42 U.S.C. 2000e, et seq., 78 Stat. 253, July 2, 1964)

• • •

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX OR NATIONAL ORIGIN

SEC. 703. [42 U.S.C. § 2000e-2]

(a) It shall be an unlawful employment practice for an employer—

(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

• • •

OTHER UNLAWFUL EMPLOYMENT PRACTICES

SEC. 704. [42 U.S.C. § 2000e-3]

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment

practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

• • •

Enforcement provisions

SEC 706. [42 U.S.C. § 2000e-5]

• • •

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. . . .

• • •

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

• • •

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1346

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,

Petitioner,

v.

FRANCES P. PONS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 76-1346

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,

Petitioner,

v.

FRANCES P. PONS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. for Cert., pp. 2a-7a) is reported

at 549 F.2d 950. The opinion of the United States District Court for the Middle District of North Carolina (Pet. for Cert., pp. 7a-12a) is reported at 69 F.R.D. 576, and unofficially at 13 F.E.P. Cas. 444.

JURISDICTION

This action was brought by respondent in the United States District Court for the Middle District of North Carolina, alleging age discrimination in employment, with jurisdiction based on 29 U.S.C. sec. 626 (b),(c); 29 U.S.C. sec. 216(b).

The district court's order striking respondent's demand for jury trial was entered on January 28, 1976. The district court certified this issue for interlocutory appeal, and the United States Court of Appeals for the Fourth Circuit agreed to entertain the appeal, as provided in 28 U.S.C. sec. 1292(b); and Federal Rules of Appellate Procedure, Rule 5.

The opinion of the court of appeals was filed on February 2, 1977, vacating the order of the district court and remanding the case for further proceedings. Petitioner filed a petition for writ of certiorari on March 31, 1977, and on June 27, 1977, this court granted the petition. The jurisdiction of this Court is conferred by 28 U.S.C. sec. 1254(1).

QUESTION PRESENTED

Whether the Age Discrimination in Employment Act or the Seventh Amendment requires a jury trial upon demand in an action for damages and injunctive relief under that Act.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 626:

(b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215

of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the

Secretary to enforce the right of such employee under this chapter.

Fair Labor Standards Act. 29 U.S.C. sec. 216(b):

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employees shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of this action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing

of a complaint by the Secretary of Labor in an action under section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection.

STATEMENT OF THE CASE

Respondent was discharged from her position of financial services coordinator by petitioner on January 31, 1975, when she was 48 years of age. (A.3). Respondent commenced a civil action against petitioner, alleging that her discharge was an act of discrimination on the basis of her age, and that it violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 623(a)(1). Respondent's prayer for relief proposed an injunction requiring her reinstatement, and to "[a]ward plaintiff monetary damages consisting of wages from date of discharge to date of judgment, together with an equal amount of liquidated damages."[1] In the

1 The Appendix, p.4, erroneously includes the word "attorney" after the word "plaintiff" and before the word "monetary".

complaint respondent demanded trial by jury. (A. 4-5).

Petitioner filed a motion to strike respondent's jury trial demand. (A.9). Following briefing and argument, the district court ordered that respondent's demand for jury trial be stricken. (Pet. for Cert., p. 7a-12a).

An interlocutory appeal on this issue was certified by the district court, and was allowed by the court of appeals.

While the appeal was pending in the court of appeals, respondent filed a motion in that court seeking leave to amend her complaint, by adding paragraphs alleging that petitioner acted purposely, intentionally, willfully, wantonly, oppressively, and with a reckless disregard of respondent's rights; alleging damages in addition to loss of wages, consisting of depression and anxiety, humiliation and embarrassment. The motion also sought to substitute for the part of the prayer for relief quoted above which seeks damages, the following:

> Award plaintiff monetary damages consisting of lost wages and all her other actual damages, statutory liquidated damages, and common law punitive damages. (A. 11-12).

A unanimous panel of the court of appeals reversed the district court. In the opinion written for himself and Circuit Judge Russell, Senior Circuit Judge Bryan expressed the opinion that respondent is entitled to trial by jury in this case by virtue of both the Seventh Amendment and the Age Discrimination Act itself. Circuit Judge Butzner stated in his concurring opinion that because the Age Discrimination Act confers on respondent the right to trial by jury, it is unnecessary to consider the effect of the Seventh Amendment. Respondent's motion for leave to amend the complaint was remanded for presentation to the district court. (Pet. for Cert., pp. 2a-7a).[2]

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2 Other cases holding in favor of and against the right of jury trial in Age Discrimination in Employment Act cases are cited in Notes 3 and 2, respectively, of Petitioner's Brief, pp. 4,6.

SUMMARY OF THE ARGUMENT

I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ITSELF ESTABLISHES THE RIGHTS OF LITIGANTS TO TRY THEIR CASES BY JURY.

A. On its face the Age Discrimination in Employment Act provides for legal relief.

In this action respondent seeks lost wages, statutory liquidated damages, common law actual damages, and punitive damages. The Age Discrimination in Lmployment Act provides for "such legal or equitable relief" as may be appropriate.

The claim for lost wages is based on the statutory language "amounts deemed to be unpaid minimum wages or unpaid overtime compensation." The language is adopted by reference from the Fair Labor Standards Act. Under that statute, the lower courts have uniformly upheld the right to trial by jury for lost wage claims in cases brought by private individuals.

Both common law actual (e.g., pain and suffering) and punitive damages also appear to be recoverable under the Age Discrimination in Employment Act. Jury trials are clearly available for such claims.

Statutory liquidated damages under the Age Discrimination in Employment Act are recoverable for willful violations. This is a deviation from the provision in the Fair Labor Standards Act, as amended by the Portal-to-Portal Act, authorizing courts in their discretion to decline to award punitive damages, when it is shown to the court's satisfaction that the employer acted reasonably and in good faith. Unlike this discretionary determination, the term willful is appropriate for decision by the jury as factfinder.

B. Because the Act unequivocally allows legal relief, extrinsic aids to construction are inappropriate.

Because the meaning of the Age Discrimination Act is clear and unambiguous in allowing legal relief for violations, it is improper to resort to legislative history and other extrinsic aids to construction. Nevertheless, an examination of the Act's legislative history does not indicate any Congressional intent to make jury trials unavailable, and the one reference in the floor debates to the mode of trial assumes that there will be trial by jury.

C. Title VII is materially different from the Age Discrimination in Employment Act.

Petitioner is wrong in arguing that the Age Discrimination in Employment Act is so similar to Title VII that Title VII cases in the lower courts disallowing jury trials should be followed here. Title VII on its face authorizes only "equitable relief". The legislative history of Title VII clearly shows the intent of Congress not to allow jury trials in cases brought under that statute, except for certain types of criminal contempt proceedings. There are other marked differences between Title VII and the Age Discrimination in Employment Act, contraindications that enforcement procedures under both statutes should be the same; these include the availability of class action under Title VII and not under the Age Act and several significant differences in the handling of complaints filed with the respective administrative agencies.

II. THE SEVENTH AMENDMENT ALSO ENTITLES PARTIES TO AN ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT TO A TRIAL BY JURY.

Any doubt as to the availability of a jury trial is to be resolved in favor of that right, since it is a constitutional one, and no similar requirement protects trials by the court.

Treatment of lost wages as incidental to the equitable right of reinstatement

and thereby not amenable to jury trial, is an effort to revive the equity clean-up doctrine. The equity clean-up doctrine has been soundly rejected by decisions of this Court which hold that the right to jury trial on legal claims cannot be lost by the court's determination of equitable issues in the same case.

Cases disallowing jury trials in proceedings before administrative bodies are inappropriate here, because here private rather than public rights are being litigated, the government is not a party to the action, and the case is before a court instead of an administrative agency.

A. The issue is legal rather than equitable under the custom of the courts prior to the merger of law and equity.

Jury trials are claimable for causes of action arising under modern statutes, which deal with issues unknown at common law. The substantive claim in this case is legal, not equitable, analogous to the common law claim for breach of employment contract by wrongful discharge.

B. The remedy sought is legal, not equitable.

The claim for lost wages in this case is for legal relief. Under the Fair

Labor Standards Act provision for recovery of unpaid minimum wages or overtime compensation, adopted by the Age Discrimination in Employment Act, the recovery and computation of the damage award are not discretionary. In accordance with well established principles the punitive and liquidated damage claims made by respondent are not triable in a court of equity, but must be presented to a common law court. While respondent also seeks the equitable remedy of reinstatement, her right to trial by jury on the legal claims for damages are not to be lost by court trial of the common issues of fact.

C. The issue is triable to the jury given their practical abilities and limitations.

The trial of an age discrimination case is well within the practical abilities and limitations of jurors, because the computations of damages are governed by well established formulae, are mathematically simple, and may be reasonably estimated when the exact amount due cannot be ascertained.

* * *

The Court's analysis in this case should be aided by the recent decision of Curtis v. Loether, 415 U.S. 189 (1974),

which held there is a right to trial by jury under the fair housing law, Title VIII of the Civil Rights Act. That statute provides for recovery of actual damages, as well as allowing equitable relief.

The worthy objective of shielding victims of discrimination from juror bias does not overcome the Seventh Amendment right of trial by jury, the Court held in Curtis v. Loether. The same reasoning applies in the present case.

An action for employment age discrimination involves the adjudication of legal rights triable by jury, just as is true of housing discrimination claims.

ARGUMENT

I. THE AGE DISCRIMINATION IN EMPLOYMENT ACT ITSELF ESTABLISHES THE RIGHTS OF LITIGANTS TO TRY THEIR CASES BY JURY.

In the complaint respondent sought "monetary damages" consisting of lost wages from time of discharge to date of judgment and statutory liquidated damages. In her proposed amendment to the complaint, which has been remanded to, but has not yet been decided by, the district court, plaintiff further seeks common law actual damages and common law punitive damages.

A. On its face the Age Discrimination in Employment Act provides for legal relief.

The Age Discrimination in Employment Act, 29 U.S.C. sec. 626(b), (c), provides that the courts shall have jurisdiction in actions brought by private individuals alleging age discrimination "to grant such legal or equitable relief as may be appropriate . . ., including without limitation, judgments compelling employment, reinstatement or promotion, or enforcing liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section;" and again provides that such actions may be maintained in any court of competent jurisdiction for "such legal or equitable relief

as will effectuate the purposes of this chapter." It is also provided that the Age Discrimination in Employment Act shall be enforced in accordance with the "powers, remedies, and procedures" provided in section 216 (and other sections), and any amount owing to a person as a result of age discrimination "shall be deemed to be unpaid minimum wages or unpaid overtime compensation" for the purpose of section 216.

The term "legal relief" cannot be regarded as having no meaning.[3] It is to be assumed, as seems reasonable, that the term "equitable relief" applies to the enumerated remedies of "compelling employment", "reinstatement", and "promotion". The term "legal relief" then would logically apply to the enumerated remedy of "enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation." This language clearly refers to the Fair Labor Standards Act, 29 U.S.C. sec. 216(b),

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[3] See e.g., Clark v. Vebersec Finanz-Korporation, A.G., 332 U.S. 480, 488 (1947); Markham v. Cabell, 326 U.S. 404, 410-411 (1945).

incorporated by reference in the above-quoted part of the Age Discrimination in Employment Act. Applying section 216(b), the lower courts have uniformly held that there is a right to jury trial. McClanahan v. Mathews, 440 F.2d 320 (6th Cir. 1971); Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965); Wirtz v. Turner, 330 F.2d 11 (7th Cir. 1964); Olearchick v. American Steel Foundries, 73 F.Supp. 273 (W.D.Pa. 1947). When Congress enacted the Age Discrimination in Employment Act and expressly provided that the "procedures" invoked in section 216(b) apply to actions arising under the new statute, it must be assumed that one of those applicable "procedures" intended by Congress was the right to trial by jury so firmly established under section 216(b). Helvering v. Marshall, 303 U.S. 303 (1938). Shapiro v. United States, 335 U.S. 1 (1948).

While liability for amounts deemed unpaid minimum wages or unpaid overtime compensation is the only legal remedy listed, the words "including without limitation" are used to introduce the series. Other forms of legal relief which respondent contends are available under the Age Discrimination in Employment Act include common law actual damages, common law punitive damages, and statutory liquidated damages.

The Age Discrimination in Employment Act is to be regarded as having established a new statutory tort, and once liability under the statute appears, the full panoply of usual tort remedies should be available to compensate injured parties for all provable damages. "[T]he existence of a statutory right implies the existence of all necessary and appropriate remedies." Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969). Generally, the civil rights laws "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." Monroe v. Pape, 365 U.S. 167, 187 (1961).[4] It is submitted, therefore, that common law actual damages, such as damages for emotional distress, are recoverable under the Act.

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4 The one case considering this issue and allowing recovery for pain and suffering in an age discrimination case, Rogers v. Exxon Research and Engineering Company, 404 F.Supp. 324 (D.N.J. 1975), was reversed on appeal, 550 F.2d 834 (3rd Cir. 1977).

Under other civil rights statutes lower courts have allowed recoveries for mental distress. Title VII, 42 U.S.C. sec. 2000e: Humphrey v. Southwestern Portland Cement Company, 369 F.Supp. 832 (W.D.Tex. 1973),

Punitive damages have always been recoverable at common law, and where not expressly precluded by a statute permitting legal relief generally, may be recovered under the statute in accordance with common law principles. If the defendant acts willfully and intentionally and in gross disregard of the rights of plaintiff under the statute, punitive damages are recoverable. Lee v. Southern Homes Sites Corporation, 429 F.2d 290 (5th Cir. 1970). On this basis common law punitive damages were held recoverable under the Age Discrimination in Employment Act. Murphy v. American Motors Sales Corp., 410 F.Supp. 1403 (N.D.Ga. 1976).

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4 Continued
rev'd on other gr. 488 F.2d 691 (5th Cir. 1974). Title VIII, 42 U.S.C. sec. 3604, 3612: Williams v. Matthews Co., 499 F.2d 819 (8th Cir. 1974); Jeanty v. McKey and Poague, Inc., 496 F.2d 1119 (7th Cir. 1974); Steele v. Title Realty Co., 478 F.2d 380 (10th Cir. 1973). The availability of such actual damages is also supported in the literature. Comment, "Implying Punitive Damages in Employment Discrimination Cases," 9 Harv. Civ. Rights - Civ. Lib. L.Rev. 325, 367-369; Duda, "Damages for Mental Suffering in Discrimination Cases," 15 Clev. Mar. L. Rev. 1 (1966).

Statutory liquidated damages in an amount equal to the amounts deemed unpaid minimum wages or overtime compensation, are also specifically recoverable for willful violations, according to section 626(b).[5] Under Section 216(b) as originally enacted, liquidated damages were to be awarded as a matter of course whenever liability for unpaid minimum

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5 In the district court opinion it is stated that respondent has conceded that the liquidated damages issue would not be triable to a jury. (Pet. for Cert. pp. 7a-8a, n. 2). This concession was actually that Chilton v. National Cash Register Company, 370 F.Supp. 660 (S.D.Ohio 1974), the only published decision dealing with the right to a jury trial under the Age Discrimination in Employment Act at the time of the district court's decision, had held that the issue of damages as unpaid wages was for the jury, but that the issue of liquidated damages was not triable by jury. It is not respondent's position that Chilton was correct in withholding the liquidated damage question from the jury.

wages or overtime compensation was established. In 1947, Congress passed the Portal-to-Portal Act, 29 U.S.C. sec. 260, which provided that the court in its sound discretion could decline to award liquidated damages, "if the employer shows to the satisfaction of the court that the act or omission . . . was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act . . . ." The Age Discrimination in Employment Act incorporated by reference the remedies and procedures of sections 211(b), 215, 216, and 217 of the Fair Labor Standards Act, but there was no incorporation either expressly or by implication of section 260 of that act. Congress chose another method to modify the strict liability for liquidated damages under 216 (b), by providing in section 626(b), that liquidated damages are to be awarded only in cases of "willful violations". Thus, the fact finding of the presence or absence of willfullness has been prescribed, instead of the court's being satisfied and exercising its discretion, as a vehicle for avoiding liquidated damages liability. Therefore, liquidated damages are another form of "legal relief" provided for by section 626(b). Cleverly v. Western Electric Company, 69 F.R.D. 348 (W.D.Mo. 1975); Cf, Murphy v. American Motors Sales Corp., supra.

It is axiomatic that when the gist of the prayer for relief is monetary damages, the remedy is legal in nature, and the right of trial by jury attaches. Dairy Queen v. Wood, 369 U.S. 469 (1962). Respondent has identified four types of monetary damages coming within the term "legal relief" expressly invoked by Congress: amounts deemed unpaid minimum wages or overtime compensation, common law actual damages, common law punitive damages, and statutory liquidated damages. Two of these types of legal relief were requested by respondent in her original complaint, and the other two are being sought by the motion to amend the complaint which has been remanded to the district court.

B. Because the Act unequivocally allows legal relief extrinsic aids to construction are inappropriate.

Here then Congress has expressly and unequivocally allowed the recovery of "legal relief" for age discrimination, and respondent has prayed for each right of legal relief that may be regarded as available under the statute. Yet petitioner would seek to deprive respondent of her jury trial right in this case by ignoring the unmistakable language of the statute, and by attempting to divine Congressional intent to make this statute a part of a general federal program against employment

discrimination for which trial by jury is unavailable. This effort is in conflict with universally accepted principles of statutory construction. If the meaning of a statute is clear, the courts are not at liberty to resort to legislative history and other extrinsic aids to construction. United States v. Missouri Pacific Railway Co., 278 U.S. 269, 277 (1929); Ex parte Collett, 337 U.S. 55, 59 (1949); United States v. Wiltberger, 5 Wheat. 76, 95-96 (1820). There must be an uncertainty or ambiguity in the statute to warrant reference to other statutes for the purpose of construing it. Atlantic Coast Line Railway Co. v. Phillips, 332 U.S. 168 (1947). The term "legal remedy" is plain and certain; there is no vagueness or ambiguity which permits recourse to extrinsic aids to construction.

Nevertheless, neither an examination of the legislative history of the Age Discrimination in Employment Act, nor a comparison of this Act with other civil rights laws, is of any benefit to petitioner.

Apparently the only reference in the legislative debates and committee proceedings about the Act that touches upon this issue, is a stated assumption that these cases are triable by a jury. In a discussion on the Senate Floor, Senator Javits said that in an age discrimination case "[a] jury will answer Yes or No." 113 Cong. Rec. 31254

(1967).

C. Title Seven is materially different from the Age Discrimination in Employment Act.

Petitioner argues that the Age Discrimination in Employment Act must be given a construction identical to Title VII of the Civil Rights Act of 1964, 42 U.S.C. sec. 2000e, with respect to the availability of trial by jury. In the specification of judicial remedies, however, the two statutes are altogether different. Title VII provides:

> If the Court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without backpay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful

> employment practice), or any other equitable relief as the court deems appropriate. 42 U.S.C. sec. 2000e-5(g). [emphasis supplied].

Another provision of this Act expressly provides for jury trials in certain cases of criminal contempt. 42 U.S.C. sec. 2000h.

Section 2000e-5 on its face provides only for equitable relief. The remedies of reinstatement and award of back pay are to be granted as a part of the court's injunctive decree.

Legislative history supports this interpretation. The report of additional views of House Judiciary Committee member Congressman Meader, took exception to the "growing and . . . alarming tendency in adopting new Federal programs to utilize the sanction of what may be called government by injunction. . . . Such a decree is enforced by contempt proceedings in which there is no right to jury trial, and in case the defendant is found to be in contempt, he is punished by imprisonment at the discretion of the judge. The effect of the employment of this sanction of injunction rather than a civil action at law for the recovery of damages or the institution of criminal proceedings by

indictment or information is that the defendant is shorn of most of the protections set forth in the Bill of Rights of our Constitution." Congressman Meader and other members of the committee were opposed to the judicial remedies created in Title VII, because trial by jury was not made available. United States Equal Employment Opportunity Commission, Legislative History of Titles VII and IX of Civil Rights Act of 1964, pp. 2043, 2046-2050. (Hereinafter cited as "Legislative History").

It was the opposition to the elimination of trial by jury that brought about the compromise Dirksen-Mansfield provision, as altered by the so-called "Talmadge Amendments", allowing jury trials in certain criminal contempt cases. This provision is codified in 42 U.S.C. sec. 2000h. Legislative History, pp. 3379-3382, 3403-3409, 3441, 3467.

In the Senate floor debates it is clear that both the proponents and opponents of Title VII were aware that no jury trial was provided for civil actions to enforce the statute.[6]

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[6] Mr. ERVIN. Under Title VII, an order can be entered ordering a man to pay back wages to a person who had never done a

Understandably the lower court cases

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6 Continued
day's work for him. The amount of back wages may largely exceed the jurisdictional amount requiring a jury trial in common law cases under the Constitution. Title VII contains no requirement for a jury trial under any circumstances?

Mr. CASE. So far as the act itself is concerned, there is no provision for jury trial. . . .

Mr. ERVIN. No jury trial is provided.

Mr. CASE. No jury trial is provided under the terms of this section.

Mr. ERVIN. With respect to the determination of the original question, that is.

Mr. CASE. No; except, possibly, if the suit were brought by an individual. In that case, I believe it is possible that under the statute a jury trial for criminal contempt might be ordered.

Mr. ERVIN. Inasmuch as this is an injunctive procedure, it would be on the equity side of the docket, and no jury trial would be allowed. Is that not correct?

are in agreement that under Title VII

6 Continued
Mr. CASE. That is a technical matter, varying in each jurisdiction. It would depend on what kind of docket there was in the jurisdiction; whether there were two dockets or whether there were one system. Whether a person would get a jury trial would depend on the system. Only in the matter of criminal contempt would the question arise. The difference between criminal contempt and civil contempt requires a nicety of perception at which the Senator of North Carolina is much better than the Senator of New Jersey.

MR. ERVIN. Does not the Senator from New Jersey agree with the Senator from North Carolina that a suit in which injunctive relief is sought or granted is necessarily an equity proceeding in which there is no right of trial by jury?

Mr. CASE. There is no question about that.

Mr. ERVIN. All of the proceedings under Title VII will be without a jury trial. Is that correct?

Mr. CASE. It will be done without a jury trial in the case of the determination of the fact of the first instance.

there is no right of trial by jury.[7] Because of the abundantly demonstrated legislative intent not to have jury trials under Title VII, and the complete absence of anti-jury motivation on the part of Congress in adopting the Age Discrimination in Employment Act, the Title VII cases rejecting juries are irrelevant here.

While procedures under the Age Act and Title VII bear some similarity (Pet. Br. 7-8), there are also marked differences. Unlike the Age Act, Title VII has no provision for liquidated damages. Class actions are not permitted under the Age Act, La Chapelle v. Owen-Illinois, Inc., 513 F.2d 286 (5th Cir. 1975), while class

6 Continued
-- Legislative History, pp. 3295-3296.

7
Johnson v. Georgia Highway Express, 417 F.2d 1122 (5th Cir. 1969); Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975); EEOC v. Detroit Edison, 515 F.2d 301 (6th Cir. 1975); Robinson v. Lorillard Corp., 444 F.2d 791, 802 (4th Cir. 1971) (dictum). This Court took note of courts of appeals decisions holding jury trials inapplicable in Title VII cases but would "express no view on the jury trial issue in that context," in Curtis v. Loether, 415 U.S. 189, 196-197 (1974).

actions are a preferred method of adjudicating Title VII claims, Robinson v. Lorillard, 444 F.2d 791 (4th Cir. 1971). The Equal Employment Opportunity Commission administers Title VII, while the Age Act is administered by the Department of Labor. Under the Age Act the Department of Labor has a mandatory obligation to attempt to resolve the dispute by informal means, 29 U.S.C. sec. 626(d), but under Title VII the Equal Employment Opportunity Commission has no similar duty, 42 U.S.C. sec. 2000e-5(b). A plaintiff under the Age Act may file his case in court anytime after he has given sixty days notice to the Secretary of Labor of his intention to sue, 29 U.S.C. sec. 626(d), but under Title VII litigation cannot be commenced until a notice of right to sue has been received from the EEOC and then an action must be filed within ninety days following receipt of the notice, 42 U.S.C. sec. 2000e-5(f)(1).

Even without considering the radically different legislative history of the two statutes, the procedures for enforcing claims under them are so disparate that it cannot be maintained any uniform national policy would be served by disallowing jury trials under both statutes. The most crucial difference between these statutes with regard to the jury trial, of course,

is that Title VII on its face is restricted to "equitable relief", whereas the Age Act provides for "legal or equitable relief".

II. THE SEVENTH AMENDMENT ALSO ENTITLES PARTIES TO AN ACTION UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT TO A TRIAL BY JURY.

In a time of congested court dockets and delays in reaching trials that become almost intolerable, when there is a sense of urgency to streamline our system of justice, the institution of trial by jury has been questioned and criticized in some quarters. In a time when this great institution is being probed for weaknesses, it is well that we be reminded of its strengths: "how in our fallible system of human justice it is the best instrument yet devised for the determination of facts, how even its imperfections operate to rub the rough edges off of technical principles of law when they would result in unjust verdicts, how it is constantly improving with the progress of our jurisprudence and with the advance of education and enlightenment, how it gives the citizen a proud and rightful place in the administration of justice, and tends to make real our utopian dream of a 'government

of the people, by the people, and for the people.'" Those who disagree with the values embraced within our jury system are not free to make their personal philosophies a basis for undermining it through the judicial, or even the legislative, process. They must await an amendment to the Constitution. There "is no occasion for debate on that subject, because our forefathers wrote into our Constitution the right of trial by jury in both criminal and civil cases."[8] "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to a citizen . . . should be jealously guarded by the courts." Jacob v. New York, 315 U.S. 752, 753 (1942).

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8 Circuit Judge Rives, concurring and dissenting in Boeing Co. v. Shipman, 411 F.2d 365, 378 (5th Cir. 1969).

Any doubt as to the availability of a jury trial is to be resolved in favor of that right, as Mr. Justice Black has emphasized. "[T]he right to jury trial is a constitutional one, however, while no similar requirement protects trials by the court. . . ." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 510 (1959).

By contending that lost wages, a part of the monetary relief sought by respondent, is but an adjunct or is incidental to the equitable remedy of reinstatement, petitioner seeks to revive the defunct equity clean-up doctrine. (Pet. Br. 14-15). In Beacon Theatres, Inc. v. Westover, supra, the point was made that the 1938 merger of law and equity and the Rule 38(a), Federal Rules of Civil Procedure, provision that "the right to trial by jury shall be preserved inviolate," had the effect of narrowing equitable jurisdiction and broadening the right to jury trial. Mr. Justice Black concluded that "only under the must imperative circumstances, circumstances which . . . we cannot now anticipate, can the right to a jury trial of legal issues be lost" through the court's determination of equitable issues in the same case. 359 U.S. 510-511. The effect of the holding in that case, where the complaint and counterclaim both alleged anti-trust law violations, and the complaint sought only injunctive relief, but the counterclaim

sought damages as well, was to require the common issues of anti-trust violations to be tried by a jury. An example of how the 1938 merger and Rule 38(a) converted what was formerly an equitable proceeding into an action to which the jury trial right attached is provided by Ross v. Bernhard, 396 U.S. 531 (1970). This was a stockholder derivative suit. Prior to 1938 the suit would have had to be maintained in a court of equity sitting without a jury, because stockholders were not accorded standing in a court of law to seek redress for injuries done to their corporations; but if the corporation itself had sued, a jury trial would have been available prior to 1938. The Court concluded that a determination of whether the case is triable by a jury, must no longer depend on the identity of the plaintiff. It was held that because jury trials had formerly been available in some cases of this nature, the right to trial by jury could now be claimed in all such cases. Where both legal and equitable remedies are sought in the same action, the right of trial by jury will not be submerged. Ross v. Bernhard, supra, 396 U.S. at 537-538 (1970), held that "where equitable and legal claims are joined in the same action, there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the

claims."

The case upon which petitioner strongly relies, National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1936), is a pre-merger case which, after Beacon Theatres, Inc. v. Westover, Ross v. Bernhard and Dairy Queen v. Wood, 369 U.S. 469 (1962), can no longer be regarded as controlling for the purpose cited by petitioner. There an order of the National Labor Relations Board which directed reinstatement of unlawfully discharged employees and directed back pay for these employees, was held not to violate the Seventh Amendment. The statement in Jones & Laughlin that the Seventh Amendment is not applicable to cases "where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law," 301 U.S. at 48, has not withstood the test of time. It is an application of the now discredited equity clean-up doctrine. The aspect of the Jones & Laughlin case which has current validity is that there is no right to trial by jury in a proceeding before an administrative tribunal, not in the nature of an action at common law, where public rights are being litigated and the government is suing in its sovereign capacity. Most recently, this doctrine has been relied upon by the Court in determining that civil penalties enforced administratively by the

Occupational Safety and Health Administration, are not subject to the right of trial by jury in Atlas Roofing Company, Inc. v. Occupational Safety and Health Review Commission, 45 U.S.L.W. 4312 (1977). Since actions to recover for violations of the Age Discrimination in Employment Act are committed to litigation by private parties in courts of competent jurisdiction, and not to administrative tribunals, the Jones & Laughlin case is not apposite here.

The modern decisions of this Court have been summarized as requiring that a jury trial be provided if (1) the issue is "legal" rather than "equitable" under the custom of the courts prior to the merger of law and equity, (2) the remedy sought is legal, not equitable, and (3) the issue is triable to the jury given their practical abilities and limitations. James, "Right to a Jury Trial in Civil Actions," 72 Yal. L.J. 655 (1963). Each of these points is resolved in favor of the right to trial by jury in the present case.

A. The issue is "legal" rather than "equitable" under the custom of the courts prior to the merger of law and equity.

As stated by Justice Story in Parsons v. Bedford, 3 Pet. 433, 447 (1830), the availability of a jury trial depends upon whether legal rights are at issue, not

whether the particular action is derived from one of the common law forms:

> The phrase "common law," found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . By common law [the framers of the Amendment] meant . . . not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . . In a just sense, the Amendment may then well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.

Accordingly, this Court has held there is a jury trial right in many causes of action which are based on modern statutes, where the theories, rights, and obligations at issue were unknown to the common law. Dairy Queen, Inc. v. Wood, 369 U.S. 469,

(1962) (trademark laws); Hepner v. United States, 213 U.S. 103 (1909) (immigration laws); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916) (anti-trust laws); Porter v. Warner Holding Co., 328 U.S. 395 (1946) (Emergency Price Control Act); Texas and Pacific R. Co. v. Rigsby, 241 U.S. 33 (1916) (Safety Appliance Act).

The substantive issue in a case under the Age Discrimination in Employment Act is legal, not equitable. A claim of employment discrimination with a prayer for lost wages is analogous to the common law action for breach of contract by wrongful discharge, in which the right of trial by jury obtained. St. Clair v. Local Union No. 515, 422 F.2d 128 (6th Cir. 1969); Ochoa v. American Oil Company, 338 F.Supp. 914 (S.D.Tex. 1972).

B. The remedy sought is legal, not equitable.

The remedies of a legal nature prayed for in the original complaint are for damages consisting of lost wages and for liquidated damages. By the proposed amendment to the complaint, respondent also seeks common law actual damages and common law punitive damages.

Petitioner argues that the wage

loss recovery is restitutionary, and thereby somehow becomes more easily submerged into an equitable remedy. (Pet. Br. 14-17). For a wrongfully discharged employee, like respondent, the recovery is not restitutionary at all. Restitution implies some type of disgorging of unjust enrichment. Because petitioner no longer had the benefit of respondent's services after the wrongful discharge, there could have been no unjust enrichment. See D.B. Dobbs, Remedies, 222-229 (1973). Of the three types of monetary remedies, restitution, reliance and expectation, it is only the last that is relevant in a discriminatory discharge case. For breach of an employment contract, the remedy is clearly in the expectation category: the payment the employee would have received if he or she had not been discharged, less any amount obtained from substitute employment. D.B. Dobbs, supra, at 924-927.

Petitioner further contends that the granting or withholding of damages consisting of lost wages in an age discrimination case is discretionary with the court, and thereby the remedy loses its legal character. (Pet. Br. 14-17, 22). This contention is contradicted by the settled case law under the Fair Labor Standards Act provision, 29 U.S.C. sec. 216(b), incorporated by reference as the source for recoveries in the nature of unpaid minimum

wages and overtime compensation under the Age Discrimination in Employment Act, 29 U.S.C. sec. 626(b). The term unpaid minimum wages and overtime compensation contained in the Age Discrimination Act has been interpreted in a discharge case to mean "the difference between the value of the compensation by way of salary together with other specific monetary benefits, such as increased pension benefits which would have vested prior to trial, to which plaintiff would be entitled had he remained employed by defendant until the trial date and the value of his total benefits and earnings at other jobs from his discharge until the trial date." Monroe v. Penn-Dixie Cement Corporation, 335 F.Supp. 231, 234-235 (N.D.Ga. 1971).[9] It is well established that awards under Section 216(b) are not discretionary; they must be computed with as much precision as possible, based

[9] This statement was cited with approval in Brennan v. Ace Hardware Corp., 495 F.2d 368, 373 (8th Cir. 1974). Petitioner improperly cited that case for the statement that relief under Section 626 of the Age Discrimination in Employment Act is within the equitable discretion of the District Court. (Pet. Br. 22) What the Eighth Circuit really said was, "Specific questions

on the evidence adduced. Anderson v. Federal Cartridge Corporation, 62 F.Supp. 775 (D.C.Minn. 1945), aff'd. 156 F.2d 681 (8th Cir. 1945) (to the tenth of a cent per hour); Porter v. Georgia Power and Light Co., 50 F.Supp. 939 (D.C.Ga. 1943); Wirtz v. Turner, 330 F.2d 11 (7th Cir. 1964); Mitchell v. Caldwell, 249 F.2d 10 (10th Cir. 1957).

Of course, if actual common law damages are recoverable under respondent's proposed amendment to the complaint, these clearly consist of a legal remedy in the traditional sense.

As petitioner correctly states, "Actions in equity refuse to enforce a penalty and will not award punitive damages." (Pet. Br. 27). Punitive claims, including statutory penalties such as the liquidated damages provided for in the Age Discrimination in Employment Act, and common law punitive damages which are also sought in this case, are elements favorable to trial by jury, in that they are foreign

[9] Continued
concerning damages or other relief are within the equitable discretion of the district court. . . ." 495 F.2d at 373-374.

to equity. Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916); Ross v. Bernhard, 396 U.S. 531 (1970).

These remedies sought in respondent's action make it unmistakably a suit for a money judgment, which is classically a suit at common law to which the jury trial right attaches. Whitehead v. Shattuck, 138 U.S. 146, 151 (1891).

The legal nature of the remedies sought here are much easier to perceive than the complex accounting for trademark violation prayed for in Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962), which was there held subject to the Seventh Amendment.

While respondent also seeks the equitable remedy of reinstatement, the right to trial by jury arises with respect to the plainly legal claims for damages, and this right is not to be lost by trial of the legal issues incidental to the equitable ones or court trial of the common liability issue. Ross v. Bernhard, supra; Beacon Theatres, Inc. v. Westover, supra; Dairy Queen, Inc. v. Wood, supra.

C. The issue is triable to the jury given their practical abilities and limitations.

The computations of damages are governed by well established formulae, are mathematically simple, and may be reasonably estimated when the exact amount due cannot be ascertained. Monroe v. Penn-Dixie Cement Corporation, 335 F.Supp. 231, 234-235 (N.D.Ga. 1971); Brennan v. Ace Hardware Corporation, 495 F.2d 368, 373 (8th Cir. 1974). Certainly age discrimination cases do not approach the complexity of accounting actions for trademark violations held to be subject to trial by jury in Dairy Queen, Inc. v. Wood.[10]

[10] Prior to the district court's decision of this case, two cases alleging violations of the Age Discrimination in Employment Act had been tried in the Middle District of North Carolina. In both of these cases a jury trial was demanded by the plaintiff, and in both cases the issues were submitted to a jury. These cases are Carroll C. Estes v. Joseph Schlitz Brewing Company, C-267-WS-72 and Anna Rose Duncan Higgins v. Blue Ridge Electric Membership Corporation, C-212-WS-72. Relevant portions of those files are included in the record of the present case.

* * * *

Particularly illuminating to the discussion of whether jury trials are available in discrimination cases is this court's recent decision of Curtis v. Loether, 415 U.S. 189 (1974), where it was held that there is a jury trial right in actions brought under the fair housing law, Title VIII of the Civil Rights Act, 42 U.S.C. sec. 3612.[11]

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10 Continued
The records of these cases indicate no unusual difficulties encountered as a result of submitting the issues to the jury.

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Section 3612 provides:

> The Court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order or other orders, and may award to the plaintiff actual damages and not more than $1,000.00 punitive damages, together with court costs and a reasonable attorney's fee. . . .

Petitioner there argued that the Seventh Amendment is inapplicable to new causes of action created by Congressional enactment. Citing Dairy Queen, Inc. v. Wood, Hepner v. United States, and other cases referred to herein, the Court rejected that argument. "Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." 415 U.S. at 194.

Like petitioner here, petitioner in that case invoked the authority of National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1 (1937). The Court held that, "Jones & Laughlin merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." 415 U.S. at 194.

Unquestionably, the Congressional purpose of making Title VII violations remediable in equitable proceedings, rather than actions at law, was to shield the victims of racial discrimination in

employment from possible racial prejudice by jurors. Comment, "The Right to Jury Trial under Title VII of the Civil Rights Act of 1964," 37 U.Chi.L.Rev. 167 (1969). In Curtis v. Loether, supra, the Court also recognized the possibility of juror prejudice, but held that it could not control the outcome of the decision. "[T]hese considerations are insufficient to overcome the clear command of the Seventh Amendment." The court pointed to the protection against the risk of prejudice afforded by the trial judge's power to direct a verdict, to grant judgment notwithstanding the verdict and to grant a new trial. 415 U.S. at 198. Fortunately, in connection with age discrimination cases there is no recognized pervasive prejudice against older workers by the community at large, comparable to the prejudice of potential jurors against minority workers. Among the values generally recognized by our society is a duty of respect and honor to older persons. There is no inconsistency between the Fifth Commandment, Exodus 20:12, and the Seventh Amendment. Thus, the problem of jury prejudice is not a consideration in an action under the Age Discrimination in Employment Act. It should be noted that in the present case it was the employee who

demanded the jury, and the corporate employer which wants to avoid a jury trial.[12]

The Court in Curtis v. Loether concluded that an action for damages under 42 U.S.C. sec. 3612 is an action to enforce "legal rights" within the meaning of the Seventh Amendment cases, including Ross v. Bernhard and Dairy Queen, Inc. v. Wood. Further, the Court found that the statutory cause of action is analogous to a number of tort actions recognized at the common law, such as an action for breach of an innkeeper's duty not to refuse temporary lodging to travelers, and actions to redress defamation and intentional infliction of mental distress. 415 U.S. at 195-196, n. 10.

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[12] In this connection it is observed that the petitioner employer is supported in its efforts to deny respondent a jury trial by the Equal Employment Advisory Council, as amicus curiae. The Equal Employment Advisory Council's members are all employers, and the aim of the organization is to minimize liability of employers under various employment discrimination laws. (Equal Employment Advisory Council Br. 1-2).

Much of the reasoning of the Court in Curtis v. Loether applies equally to the present case. It is submitted that the result should be the same, and respondent should be allowed her right to trial by jury.

CONCLUSION

Bacause both the Age Discrimination in Employment Act itself and the Seventh Amendment require a trial by jury in this case, the decision of the United States Court of Appeals for the Fourth Circuit ought to be affirmed.

Respectfully submitted,

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FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1346

LORRILARD, A Division of Loews Theatres, Inc.,

Petitioner,

—against—

FRANCES P. PONS,

Respondent.

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, AS *AMICUS CURIAE*

JONATHAN A. WEISS
Legal Services for the Elderly Poor
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1346

LORILLARD, A Division of Loews Theatres, Inc.,

Petitioner,

—against—

FRANCES P. PONS,

Respondent.

BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, AS *AMICUS CURIAE*

Statement of Interest

Legal Services for the Elderly Poor is funded by Community Action for Legal Services and the United States Department of Health, Education, and Welfare to provide assistance on research and litigation to lawyers dealing with the problems of the elderly. Legal Services for the Elderly Poor is particularly concerned with discrimination in employment against older persons, which is almost universal in the United States, and which denies approximately ten per cent of this country's population the opportunity to earn a living and to contribute to society by continuing to work.

Legal Services for the Elderly Poor has participated as co-counsel or *amicus* in numerous cases before this Court

involving the elderly including *Graham* v. *Richardson*, 403 U.S. 365 (1971), *Allied Chemical Workers* v. *Pittsburgh Plate Glass*, 404 U.S. 107 (1971), *Ortwein* v. *Schwab*, 410 U.S. 656, *reh. den.*, 411 U.S. 922 (1973), and *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).

All parties have consented to the filing of this *amicus* brief.

The consent letters are annexed.

Question Presented

Does a party have the right to demand a jury trial in an action brought under Age Discrimination in Employment Act of 1967, where the relief sought is lost wages?

Summary of Argument

The age Discrimination in Employment Act of 1967 (hereinafter the "Act" or "ADEA") 29 U.S.C. §§ 621 et seq., authorizes private individuals to seek "legal or equitable relief" through civil action in the District Courts 29 U.S.C. § 626(c). The Act identifies lost wages as one form of legal relief. Traditionally such legal remedies predicate a jury trial.

The enforcement provisions of the Act follow those of the Fair Labor Standards Act (hereinafter FLSA) 29 U.S.C. §§ 216 & 217. Section 216(b) which addresses the private right of action for unpaid earnings, consistently has been read to provide a right to jury trial.

Analogies between the availability of trial by jury in ADEA and in Title VII of the Civil Rights Act of 1964 are inapposite. Title VII differs significantly from ADEA in statutory language, in Congressional intent as evidenced

by the legislative history, and by the underlying policy justifying the legislation itself.

The right to demand a jury trial in civil actions occupies a favored constitutional position. If a cause of action includes a legal issue, compelling the determination of legal rights and remedies, then the Seventh Amendment governs. The claim for lost wages under ADEA represents a claim for legal relief, and is analogous to an action at common law. The joinder of this legal claim with one or more claims for equitable relief arising out of the same factual circumstances does not defeat the right to a jury trial under the Seventh Amendment.

ARGUMENT

POINT I

The Act, in Creating a Cause of Action for the Legal Relief of Lost Wages, and Incorporating the Enforcement Provisions of the Fair Labor Standards Act, Contemplates the Litigant's Right to Demand a Jury Trial.

A. *Statutory Language*

Section 7(c) of the Act, 29 U.S.C. § 626(c), authorizes aggrieved individuals to seek "such legal or equitable relief as will effectuate the purposes of this chapter"[1] through a civil action in the federal District Courts. Sec-

[1] The Congressional statement of purpose is found in Section 2 of the Act, 29 U.S.C. § 621:

"... [O]lder workers find themselves disadvantaged in their efforts to retain employment, ...;

the setting of arbitrary age limits regardless of potential for job performance has become a common practice, ...;

It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; ... 29 U.S.C. § 621(a)(1), (2), & (b).

tion 7(b) 29 U.S.C. 626(b) confers jurisdiction on the federal courts to grant the appropriate "legal or equitable relief", and in the same sentence spells out what that relief might be: "... including without limitation judgments compelling employment, reinstatement, or promotion, or *enforcing the liability of amounts deemed to be unpaid* minimum wages or unpaid overtime compensation under this section." (emphasis added).[2]

In identifying forms of relief, Congress cited specific remedies as examples of either legal or equitable relief. It is well settled that judgments compelling specific performance are equitable in nature. 4 Pomeroy's *Equity Jurisprudence* (5th ed 1941) § 1400, 5 Moore, *Federal Practice* ¶ 38.21 (1977)." [A] statute ought . . . to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" *Washington Market Co.* v. *Hoffman*, 101 U.S. 112, 115-16 (1879), quoted in *U.S.* v. *Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971). If the phrase "legal relief" is to be rendered meaningful, it must be interpreted to include monetary awards for lost earnings, the "amounts deemed to be unpaid . . ." of the Act.

Congress thus has created an action for parties seeking the legal relief of lost or unpaid wages. Such an action, in which the courts administer a legal remedy, traditionally calls for a jury trial. The Seventh Amendment, establishing the right to a jury trial in suits at common law, has long been recognized as applying to actions in which legal rights and remedies, as opposed to merely equitable ones, were being determined *Parsons* v. *Bedford*, 3 Pet. 433, 447

[2] "amounts deemed to be unpaid minimum wages or unpaid overtime compensation" refers to the express incorporation of §§ 216 & 217 of the Fair Labor Standards Act.

(1830).[3] Congress, in specifying that legal as well as equitable relief would be available, must have intended suits in which legal rights and remedies were being determined and juries therefore required. The Act, by its language, has extended to litigants seeking lost wages the right to a jury trial.

B. *Incorporation of FLSA Enforcement Provisions*

Section 7(b) of the Act, 29 U.S.C. § 626(b), in discussing the Act's enforcement scheme, expressly incorporates related provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 216(b), 216(c), 217. Lost wages, the legal issue on which respondent has demanded a jury trial, are "deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of Sections 216 & 217 of this title." 29 U.S.C. § 626(b) In the instant case, respondent initiated her action for lost wages as a private party without any intercession by the Secretary. The relevant FLSA provision is 29 U.S.C. § 216(b), in which individual employees may maintain an action for unpaid minimum wages or unpaid overtime compensation.[4]

[3] The statutory argument is advanced in the context of a Constitution that commands the right to jury trials in civil actions at law. We do not attempt to interpret the Seventh Amendment here, but simply recognize that statutory language was chosen against a background of accepted constitutional practice. The statutory argument is set forth independent of and prior to Constitutional analysis, since the Court will refuse to pass on constitutional issues if other grounds are present on which a case can be decided. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 347 (1936) (Brandeis, J. Concurring), *Siler* v. *Louisville & Nashville R.R. Co.*, 213 U.S. 175 (1909).

[4] The Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., prohibiting violations of minimum wage and maximum hours provisions, enforces compliance by both equitable and legal remedies; 29 U.S.C. § 216(b) confers on the employee a right of action against his employer for unpaid minimum wages or unpaid overtime com-

Courts have consistently recognized the right to a jury trial in employee actions brought under § 216(b) for withheld wages or overtime compensation. *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965); *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950); *Olearchick* v. *American Steel Foundries*, 73 F.Supp. 273 (W.D. Pa. 1947). The decisions in *Jones, Times Publishing, & Olearchick*, precede Congressional passage of ADEA, and the explicit holding that aggrieved employees were entitled to a jury trial in their suits for back wages has never been denied in the federal courts. Congress, in incorporating § 216, and implicitly this line of cases, into ADEA made certain the resultant availability of juries.

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pensation, and for liquidated damages; 29 U.S.C. § 216(c) permits the employee to waive his rights under § 216(b), and to request that the Secretary of Labor bring an action to recover deficiencies in compensation after prior judicial decisions have finally settled all issues of law; 29 U.S.C. § 217 provides for a suit by the Secretary to enjoin violations of the minimum working standards and to restrain discriminatory discharges resulting from employee participation in enforcement proceedings. The action may include a plea by the Secretary for restraint of the withholding of unpaid compensation.

Courts have favored the right to jury trial in § 216(c) actions, *Mitchell* v. *City Ice Co.*, 273 F.2d 560 (5th Cir. 1960), *Wirtz* v. *Turner*, 330 F.2d 11 (7th Cir. 1964), and have denied the right to a jury trial in § 217 actions *Wirtz* v. *Jones*, 340 F.2d 901 (5th Cir. 1965), *Hodgson* v. *Stewart In-Fra-Red Commissary Inc.*, 370 F. Supp. 503 (E.D. Pa. 1973). In *Mitchell* v. *Robert De Mario Jewelry Inc.*, 361 U.S. 288 (1960) this Court held that the District Court had jurisdiction-in equity in an action brought by the Secretary under § 217 to include an order to reimburse back wages along with an order for reinstatement. The decision clearly supports the holding in *Wirtz* v. *Jones* and *Hodgson* v. *Stewart In-Fra-Red Commissary Inc.*, *supra*.

All of the above decisions address actions brought by the Secretary in his capacity of service to the public interest. They raise issues concerning the FLSA which will not be addressed here. *See* Note *Fair Labor Standards Act & Trial by Jury*, 65 Colum. L.Rev. 514 (1965).

The instant action, brought by respondent as a possible litigant, is linked to the 'private right of action' provision of FLSA, i.e. § 676(b).

During the course of Senate consideration of ADEA, Senator Javits remarked on the floor that in determining liability under the Act, "[a] jury will answer yes or no." 113 Cong. Rec. 31255 (1967). This statement that juries would hear ADEA cases raised no objections or inquiries on the Senate floor.

Accordingly it is respectfully submitted that the incorporation of § 216(b) is susceptible of no interpretation other than that Congress intended and created the right to demand a jury trial for all individual employees seeking the relief of lost wages under ADEA.

C. Title VII Distinguished

Attempts have been made by some lower courts[5] to analogize the enforcement procedures of ADEA to those of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g). ADEA is in one sense a legislative offspring of Title VII,[6] and the two Acts call for virtually identical prohibitory procedures. But the statutory language on enforcement, the legislative history addressing modes of trial, and the underlying policy considerations of 42 U.S.C. § 2000e-5(g) are significantly different and must be distinguished from corresponding factors in ADEA.

In § 2000e-5(g), Congress selected language strongly implying that available relief is exclusively of an equitable

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[5] In *Hannon* v. *Continental National Bank*, 427 F.Supp. 215 (D. Colorado, 1977) the Court relies heavily on an affiliation in remedial provisions and purposes between ADEA and Title VII. In *Morelock* v. *N.C.R. Corp.*, 546 F.2d 682 (6th Cir. 1976) and *Polstorff* v. *Fletcher*, 430 F.Supp. 592 (N.D. Ala. 1977) the court assimilates the purpose and purportedly broad remedial language of ADEA to that of Title VII.

[6] Section 715 of the Civil Rights Act of 1964 (PL 88-352) directed the Secretary of Labor to make a study of the problem of age discrimination in employment. H.R. Rep. No. 805, 90th Cong., 1st Sess. *reprinted in* [1967] U.S. Code Cong. & Ad. News 2214.

nature, to be awarded at the discretion of the court.[7] An order compelling reinstatement or hiring may be "with or without back pay". The provision that a court *may* issue injunctions or orders upon finding violations, and that the order *may* include reinstatement which *may* in turn be accompanied by back pay indicates the expectation that judicial discretion will be exercised in determining all forms of relief. After listing various specific forms of relief, the sentence finishes with "*or any other equitable relief* as the court deems appropriate" (emphasis added). The construction doctrine of *ejusdem generis* leads to the conclusion that *only* equitable forms of relief are permitted, and that discretionary awards of back pay were not intended as damage actions at common law that would trigger a jury trial.[8]

[7] The relevant text of § 2000e-5(g) is as follows:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

[8] See Comment, *The Right to Jury Trial Under Title VII of the Civil Rights Act of 1964*, 37 U.Ohio L. Rev. 167 (1969): "Nowhere, so far, has it been argued seriously that Congress intended to provide for jury trials. . . . The language . . . would suggest that the statute contemplates that the judge without a jury will determine all appropriate relief in a single order." *Id.* at 169-70. *Accord, Developments in the Law—Employment Discrimination & Title VII of the Civil Rights Act of 1964*, 84 Harv.L.Rev. 1109, 1264-69 (1971). *Cf. Equal Employment Op. Com'n* v. *Detroit Edison Co.*, 515 F.2d 301, 308-309 (6th Cir. 1975), applying the doctrine of *ejusdem generis* in holding that punitive damages, as legal relief, are not awardable under Title VII.

This reading of the statutory language is reinforced by the legislative history of Title VII. Opponents of the Act criticized the prospect of "government by injunction," fearing that suits in equity would strip defendants of many constitutional protections including the right to a jury trial. *See E.g.* H.R. Rep. No. 914, 88th Cong. 2nd Sess., *reprinted* in [1964] U.S. Code Cong. & Ad. News 2415. During the floor debates, Senator Case, who was a moving force behind Title VII, and Senator Ervin engaged in the following colloquy:

> Mr. Ervin. Under Title VII, an order can be entered ordering a man to pay back wages to a person who had never done a day's work for him. The amount of back wages may largely exceed the jurisdictional amount requiring a jury trial in common cases under the Constitution. Title VII contains no requirement for a jury trial under any circumstances?
>
> Mr. Case. So far as the Act itself is concerned, there is no provision for jury trial. Of course, whether a jury trial would be required would depend upon the Supreme Court in developing further its decision of the day before yesterday in the Barnett case. A jury trial might be provided if the penalty were heavy enough.
>
> Mr. Ervin. No jury trial is provided.
>
> Mr. Case. No jury trial is provided under the terms of this section.

110 Cong. Rec. 7255 (1964).

The enforcement provisions of ADEA include none of this clear-cut opposition to jury trials but its recognition as mentioned above. The provisions of § 216(b), incorporated into § 626(b), do not allow for the type of equitable discretion available under Title VII: any violator "*shall* be liable to the employee or employees affected in the amount

of their unpaid minimum wages or their unpaid overtime compensation . . ." (emphasis added). Once liability has been established, the dispensing of relief in the form of monetary damages occurs automatically just as it would in a common law contract action for damages. *See e.g. Olearchick* v. *American Steel Foundries,* 73 F.Supp. 273 (W.D. Pa. 1947). The contrast is there clearly drawn, for as this Court stated, in Title VII actions: ". . . back pay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts 'may' invoke." *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975).

In the course of Senate consideration of ADEA, Senator Dominick raised the issue of possible conflict between the administration of Title VII and ADEA. Senator Javits in his reply stated that the two Acts "will operate completely independently of each other, as will the enforcement procedures," 113 Cong. Rec. 31255 (1967). Congress was not intending to duplicate the enforcement provisions of Title VII, simply because it had a new piece of legislation which also dealt with discrimination in employment.

Underlying these crucial differences in statutory language and legislative history, Title VII and ADEA approach the problems of enforcement from different conceptual bases. Title VII is part of the 1964 Civil Rights Act, which called for extraordinary action in response to a problem of historic and Constitutional magnitude. The House Judiciary Committee, in its General Statement as it reported the Bill out, stressed that one hundred years after formal emancipation, blacks were still denied "the rights, privileges and opportunities which are considered to be, and must be, the birthright of all citizens."[9] The Congressional response was an attack on discrimination in a variety of settings, of which employment was one. Within the area of employment Congress created a whole new administrative agency, not responsible to any pre-existing Cabinet-level departments. Congress' decision to create an action for employment discrimination based on race, triable only to a judge, may reflect its fears of jury bias against plaintiff claims in such suits[10] or its sense of the urgency of the problem which the delay attendant to a jury trial would only exacerbate.[11] Whatever its motivations, Congress in creating the Equal Employment Opportunity Commission (EEOC) and establishing the right to sue as accruing under this totally new agency, was implementing what it considered to be an extraordinary remedy.

ADEA, in contrast, is a more straightforward and 'ordinary' piece of legislation and is administratively tied to the Department of Labor. The purpose of the legislation, as reported out by the House Education and Labor Committee, is stated simply: "It is the purpose of H.R. 13054 to promote the employment of older workers based on their

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[9] H.R. Rep. No. 914, 88th Cong., 2nd Sess., *reprinted in* [1964] U.S. Code Cong. & Ad. News, 7393. The General Statement refers further to the Bill resting upon the authority of "[a] number of provisions of the Constitution of the United States;" and to the urgency of a national need which requires national legislation to meet it. *Id.* at 2393.

[10] Defendants in the South apparently agree that there may be prejudice on a jury, and have sought to take advantage of it. The great majority of jury demands in Title VII cases have come from southern defendants in cases which racial discrimination was alleged. *Developments in the Law, supra,* note 7 at 1264 n. 371. *See also* Comment *supra,* note 7 at 167. *Cf. Curtis* v. *Loether,* 415 U.S. 189, 191-192 (1974), discussing the similar concerns of supporters in Congress with regard to Section 812 of the Civil Rights Act of 1968.

[11] *Developments in the Law, supra,* note 7 at 1265. *See also* Note, *Ross* v. *Bernhard: The Uncertain Future of the Seventh Amendment,* 81 Yale L.J.112, 123-26 (1974). On the particular urgency of the race discrimination issue, see [1964] U.S. Code Cong. & Ad. News *supra,* note 9.

ability." H.R. Rep. No. 805, 90th Cong. 1st Sess., *reprinted* in [1967] U.S. Code Cong. & Admin. News 2214. No mention is made of historical reverberations. The Act is intended to deal solely with problems of employment, and its enforcement mechanism is derived from already existing procedures within the Department of Labor not the specially created EEOC. Basically this is an Act addressing the problem of discharged or unhired older employees: it relies on long-standing enforcement procedures operating within an established Cabinet-level department. In prescribing a remedy, Congress had no reason to reach for the extraordinary. When legal claims and issues are being reviewed in court, a jury of one's peers, the collective judgment of twelve men and women arrived at through open-minded discussion, is the preferred means of reaching a verdict.

POINT II

The Seventh Amendment of the United States Constitution Entitles a Party to Demand a Jury Trial in an Action Raising the Legal Issue of Lost Wages Under ADEA.

A. *Constitutional Policy Favors Jury Trials in Civil Actions*

In the preceding section, we have demonstrated that the Act in its choice of language and its enforcement provisions contemplated the right to a jury trial for parties involved in a claim to lost wages. Assuming, *arguendo,* that the Act does *not* reveal a specific Congressional intention and language on the jury trial issue, we turn to the Constitutional question of whether a right to jury trial exists in this context.

"The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal

jurisprudence . . . [It] should be jealously guarded by the courts." *Jacob* v. *New York City,* 315 U.S. 752 (1942). The command of the Seventh Amendment[12] has been extended to cover all actions in which legal rights and remedies, including those created by statute, are being determined. *Parsons* v. *Bedford,* 3 Pet. 433, 447 (1830), *Curtis* v. *Loether,* 415 U.S. 189, 193 (1974).[13] The Amendment in addressing itself directly and specifically to the federal courts, calls for a uniformity of protection without deference to Executive or Legislative encroachment. The federal policy favoring jury trials has been deemed "of historic and continuing strength." *Simler* v. *Conner,* 372 U.S. 221, 222 (1963). *See Parsons* v. *Bedford supra, Scott* v. *Neely,* 140 U.S. 106 (1891), *Beacon Theatres, Inc.* v. *Westover,* 359 U.S. 500 (1959), *Dairy Queen, Inc.* v. *Wood,* 369 U.S. 469 (1962).

B. *Right to Jury Trial Depends on Nature of Issue to be Tried, Legal v. Equitable*

When Congress, in creating new rights of action, fails to provide expressly for the mode for trial, the right of action should be analogized to its historical counterpart at law or in equity, in order to determine whether a right to jury trial exists. "The proposition that we should look to history for guidance is well settled." *Rogers* v. *Loether,* 467 F.2d 1110, 1116 n.20 (7th Cir. 1972), *aff'd Curtis* v. *Loether,*

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[12] "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law" U.S. Const., amend. VII.

[13] This Court, in *Curtis* v. *Loether,* cites a number of instances in which it has found the Amendment applicable to causes of action based on statutes. *Eg. Dairy Queen Inc.* v. *Wood,* 369 U.S. 469, 477 (1962) (trademark laws); *Hepner* v. *United States,* 213 U.S. 103, 115 (1909) (immigration laws); *Fleitmann* v. *Welsbach Street Lighting Co.,* 240 U.S. 27 (1916) (antitrust laws).

415 U.S. 189 (1974). *See* 5 *Moore Federal Practice* ¶38.11 [7] (1946); 9 Wright & Miller, *Federal Practice and Procedure* § 2302 (1971).

The right to jury trial is preserved by the Seventh Amendment on the basis of the division that existed between suits at common law and suits in equity under English common law and chancery practice at the time the Amendment was adopted.[14] The application of the Amendment, however, has never been confined to those writs enforceable at common law in 1791. As Justice Story stated in *Parsons* v. *Bedford*, 3 Pet 433, 447 (1830),

> "By common law, they meant what the constitution denominated in the third article 'law'; not merely suits, which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered. . . .
>
> In a just sense, the amendment, then, may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to set the legal rights.

[14] Justice Story stated, with reference to the Seventh Amendment, in *United States* v. *Wonson*, (cc defendant Mass. 1812) 1 Gall. 5, 20, 28 Fed Cas 745, 750, N. 16, 750: "Beyond all question, the common law here alluded to is not the common law of any individual state, (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence."
The Constitutional Convention had rejected a proposal securing the right to jury trial "as usual in civil cases," because of the contrast and diversity in the several states concerning civil jury trial practices.
Capital Traction Co. v. *Hof*, 174 U.S. 1, 6 (1899), See *The Federalist* No. 83.

It is clear that the "legal rights" triable to a jury may arise from causes of action created by Congressional enactment. *Curtis* v. *Loether, supra, Hepner* v. *United States*, 213 U.S. 103 (1909).

The focus of the Seventh Amendment question is whether a particular *issue* to be tried is of a legal or equitable nature, not whether the action as a whole should be characterized as legal or equitable *Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970), *Dairy Queen Inc.* v. *Wood*, 369 U.S. 469 (1962), *Beacon Theatres* v. *Westover*, 359 U.S. 500 (1959).

In *Ross* this Court advanced a three-pronged test for determining the "legal" nature of an issue, *id.* at 538 n.10. The three elements are (i) pre-merger custom, *i.e.* whether the claim on this issue would have sounded in law when there existed separate courts of law and equity; (ii) whether the remedy sought is a traditional form of relief offered in courts of law; (iii) whether a jury is capable of making the necessary factual determinations so as to arrive at a verdict. These three elements have been applied subsequently by this and lower courts to civil causes of action created by federal statute. *Curtis* v. *Loether, supra, Cleverly* v. *Western Electric Co.*, 69 F.R.D. 348 (W.D. Mo. 1975), *Chilton* v. *National Cash Register Co.*, 370 F. Supp. 660 (S.D. Oh. 1974).

This Court's recognition of an expressed Congressional intention to limit the right to jury trial based on a particular statutory scheme or purpose, does not support any similar limitation as regards ADEA. In *Katchen* v. *Landy*, 382 U.S. 323, 339-40 (1966) the court relied on the existence of a "specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury", to affirm the summary jurisdiction of bankruptcy court in certain bankruptcy proceedings. The ADEA, un-

like the Bankruptcy Act, contains no indication of a statutory scheme limiting the right to a jury trial. The court would need some clear sign from Congress before acting to limit this right in any way. But Congress provided no such sign: indeed a reading of the statute and legislative history supports a contrary inference. Moreover, in light of the Constitutional policy favoring jury trials in civil actions, Congress must provide an adequate justification before the Court will permit the Seventh Amendment to be so confined.

> "... when Congress provides for enforcement of statutory rights in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." *Curtis* v. *Loether*, 415 U.S. 189, 195 (1974).[15]

[15] *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937) is not to the contrary. As interpreted by this Court in *Curtis* v. *Loether*, *supra* at 194, *Jones & Laughlin* by denying the applicability of the Seventh Amendment to a statutory proceeding, "merely stands for the proposition that the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication and would substantially interfere with the NLRB's role in the statutory scheme." *Cf. Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946) (Emergency Price Control Act of 1942, § 205(a)) and *Mitchell* v. *Robert De Mario Jewelry Inc.*, 361 U.S. 288 (1960) (Fair Labor Standards Act § 217), holding that the District Courts had equitable jurisdiction to award certain forms of monetary relief in actions initiated by the Authorized government official, *i.e.* Administrator or Secretary. In both instances, the Court relied in large part on the justification that enforcement in equity was integral to the fulfillment of a publicly oriented statutory purpose. In both instances reliance on this statutory purpose was linked to a 'public' right of action, which could be initiated only by the Administrator or Secretary, not by a private litigant. *But see* Note, *Congressional Provision for Non Jury Trial Amendment*, 83 Yale L.J. 401, 405 (1973), citing the right to jury trial for causes of action in which the public at large is vitally interested, *Hepner* v. *United States*, 213 U.S. 103 (1909), *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U.S. 27 (1916).

In the absence of an express provision by Congress indicating the mode of trial, the right of action created by ADEA will be analyzed according to the *Ross* test.

C. *Application of Ross Test*

An action for back pay under 29 U.S.C. § 626 has a clear analogue in the legal right that is actionable upon breach of contract for wrongful discharge. According to the English common law, a servant wrongfully discharged may treat the contract as continuing and sue for breach by reason of dismissal, *Emmems* v. *Elderton*, 4 H.L. Cas. 625, 646, 10 Eng. Rep. 606, 615 (1853).[16] *Accord Pierce* v. *Tennessee Coal, Iron & Railroad Co.*, 173 U.S. 1 (1899); 4 Corbin, *Contracts* § 958 (1964). An identity between the monetary measure of damages for wrongful discharge at common law and the statutory measure called for under ADEA supports the historical analogy. The common law entitled the wrongfully discharged employee to what he would have received had there been no breach, less what he earned or might reasonably have earned in other employment of like nature *Taylor* v. *Tulsa Tribune Co.*, 136 F.2d 981, 983 (10th Cir. 1943), 11 Williston, *Contracts* § 1358 (3rd ed. 1968), Corbin *supra* at § 958. The federal courts have accepted this approach to the measurement of damages in an action for lost wages under ADEA *Laugesen* v. *Anaconda*, 510 F.2d 307, 317-18 (6th Cir. 1975), *Brennan* v. *Ace Hardware Corp.*, 495 F.2d 368, 373 (8th Cir. 1974),

[16] For an extended discussion of historical analogies between a Title VII action for back pay by an unlawfully dismissed employee and various possible writs under the common law of contract, see *Ochoa* v. *American Oil Co.*, 338 F.Supp. 914 (S.D. Texas 1972). This Court recognized in *Curtis* v. *Loether*, *supra* at 197, that the issue of the right to jury trial under Title VII back pay suits had not been squarely presented. So too that question is not presented by the instant case, in light of the substantial differences in legislative language and history between ADEA and Title VII.

Bishop v. *Jelleff Associates*, 398 F.Supp. 579, 597 (D.D.C. 1974), *Combes* v. *Griffin Television, Inc.*, 421 F.Supp. 841, 843-44 (W.D. Okla. 1976).[17]

In the alternative, a statutory action for back pay under ADEA should be analogized to the law of tort. The Act defines a new legal duty for employers, the duty not to discharge an individual because of his age, 29 U.S.C. § 623(a)(1). Courts are authorized, under § 626(b) to compensate a plaintiff for the injury caused by defendant's tortious act *cf. Curtis* v. *Loether*, 415 U.S. 189, 195 (1974). The discharge of an employee, motivated by the age factor but justified publicly on the false ground that the employee is incompetent, is a form of defamation that is actionable.[18]

The statutory tort is also an amplification of the breach of contract for wrongful discharge action. The Act recognizes the common law of contract and of tort, and enlarges them both. Non-performance of an agreement to continue employment because of age is, under the provisions of ADEA, a failure to fulfill a duty of conduct imposed by law. This violation of a legally imposed duty invades the employee's interest in his reputation for capability as a worker. All of the above actions have a feel of factcity

[17] In *Bishop* v. *Jelleff Associates*, 398 F.Supp. 579 (D.D.C. 1974) the Court spells out the formula, in terms consistent with Williston's formulation:

> "Back pay is measured by the difference between the salary an employee would have received but for a violation of the Act and the salary actually received from other employment, less unemployment benefits. The relevant period for measuring back pay begins with the time of the loss of employment as a result of the violation and ends when the affected employee accepts or declines reinstatement." 398 F. Supp. at 597.

[18] *Cf. Meyerson* v. *Hurlbut*, 68 App. D.C. 360, 98 F.2d 232 (1938), *cert. denied*, 305 U.S. 610, *Braun* v. *Arneur & Co.*, 254 N.Y. 514, 173 N.E. 845 (1930), declaring that false words prejudicial in a pecuniary sense to a businessman or merchant were actionable for defamation.

about them, for which a jury has traditionally been deemed peculiarly sensitive.

In addition to the historical analogies between a suit for lost wages under ADEA and actions at law, the remedy sought by respondent is of the sort traditionally offered in courts of law. The award of monetary relief need not always be designated "legal relief", *Curtis* v. *Loether*, *supra* at 196: an award of actual or punitive damages is legal, but the remedy of restitution may be an equitable one. A significant distinction between damages and restitution lies in whether the injured party has a claim for *uncompensated* performance.[19] When the complaining party has performed fully or in part, and seeks recovery of what he actually has rendered or its equivalent monetary value, the relief sought is restitution, *see e.g. Economy Swimming Pool Co.* v. *Freeling*, 236 Ark. 888, 891, 370 S.W.2d 438, 440 (1963); *Sylvania Industrial Corp.* v. *Lilienfeld's Estate*, 132 F.2d 887 (4th Cir. 1943). A complaining party who sues for damages is seeking a monetary award for performance he did *not* complete, on the basis that he would have completed it if the defendant's action had not in effect prevented his performance *see e.g. Adler* v. *Drudis*, 30 Cal.2d 372, 382, 182 P.2d 195, 201 (1947), *Miller* v. *Robertson*, 266 U.S. 243, 257 (1924). In an action for lost wages based on discriminatory discharge, the theory of restitution is not applicable. Respondent is not seeking compensation for labor previously performed from which petitioner has already benefited. The facts of this case are thus distinguishable from those of *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), where the Administrator sought compensation for tenant overcharges, claiming in effect that defen-

[19] See comparative discussion of restitution and damages as forms of relief in 5 Corbin, *Contracts* §§ 1102, 1107 (1964 ed.). For discussion of the remedy of restitution, see *12 Willison, Contracts* § 1455 (1970 ed.).

dant had benefited already (and unjustly) from receipt of excess intake. That claim was for restitution: it sounded in equity without a right to jury trial. Respondent herein has no monetary claim for the value of any completed performance: she seeks an award for what she would have received had she been allowed to render performance, which is the traditional damages award in actions at law.[20]

On the question of jury abilities and limitations, there are no practical obstacles to a jury's determination of the issues presented in a discriminatory discharge action. As Justice, then Judge, Stevens stated in *Rogers* v. *Loether*,[21] regarding an analogous case of discriminatory refusal to rent "Typically, the facts are not complex and decision turns on appraisals of credibility and motive. Certainly such matters are far more suitable for jury determination than complicated commercial issues that routinely arise in derivative and antitrust litigation." *Id.* at 1118. Juries traditionally have been permitted to resolve factual issues, and apply facts to legal rules in actions for legal relief involving fraud,[22] infringement of patent,[23] and private antitrust actions.[24] There is no basis for assuming that they are not able to determine liability and compute a lost wages damages award in an action under ADEA.

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[20] See Note, *Congressional Provision for Non Jury Trial, supra* note 14, at 407-408.

[21] 467 F.2d 1110 (7th Cir. 1972) *aff'd Curtis* v. *Loether*, 415 U.S. 189 (1974).

[22] *e.g. Smyth Sales Inc.* v. *Petroleum Heat & Power Co., Inc.*, 141 F.2d 41 (3rd Cir. 1944).

[23] *e.g. Bereslavsky* v. *Caffey*, 161 F.2d 499 (2nd Cir. 1947).

[24] *e.g. Transmirra Products Corp.* v. *Monsanto Chemical Co.*, 27 F.R.D. 482 (S.D.N.Y. 1961).

D. *Legal and Equitable Issues Joined in One Action*

When legal and equitable claims are joined in one action, a claim that is basically legal does not lose its character as such because it is joined to a claim for equitable relief. *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959), *Dairy Queen Inc.* v. *Wood*, 369 U.S. 469 (1962), *Scott* v. *Neely*, 140 U.S. 106 (1891). Issues integral to the legal claim also may be relevant to the equitable claim. In such circumstances, a jury trial of the legal issues takes precedence over any prior determination of equitable claims. *Beacon Theatres, Inc.* v. *Westover*, *supra*, at 510-511, *Curtis* v. *Loether*, 415 U.S. 189, 196 n.11 (1974).

Respondent in the instant action seeks both legal and equitable relief, as she is entitled to do under 29 U.S.C. § 626(b) and 626(c). The question of whether her claim for lost wages is characterized as incidental to her claim for injunctive reinstatement is not relevant to the determination of her rights under the Seventh Amendment.

> "It would make no difference if the equitable cause clearly outweighed the legal cause so that the basic issue of the case taken as a whole is equitable. As long as any legal cause is involved the jury rights it creates control. This is the teaching of *Beacon Theatres*, as we construe it."

Thermo-Stitch, Inc. v. *Chemi-Cord Processing Corp.*, 294 F.2d 486, 491 (5th Cir. 1961) cited with approval in *Dairy Queen Inc.*, *supra* at 473 n.8.[25] If a private action for lost

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[25] The Sixth Circuit, in *Morelock* v. *N.C.R. Corp.*, 546 F.2d 682 (1976), holds that an action under ADEA seeking back pay, reinstatement and injunctive relief is "essentially equitable in nature," *id.* at 689; and finds no constitutional right to a jury trial on the issue of back pay. This decision is inconsistent under the holdings of *Beacon Theatres* and *Dairy Queen*.

wages under ADEA is triable to a jury upon timely demand, then a private action seeking *inter alia* lost wages also must be protected by the Seventh Amendment.

CONCLUSION

For the reasons stated above, the decision of the court below should be affirmed.

JONATHAN A. WEISS
Legal Services for the Elderly Poor
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(Letterhead of Smith, Patterson, Follin, Curtis & James)

July 15, 1977

Mr. Jonathan A. Weiss
Legal Services for the Elderly Poor
2095 Broadway
New York, New York 10023

Re: Frances P. Pons, Respondent v. Lorillard, A Division of Loew's Theatres, Inc., Petitioner, No. 76-1346

Dear Mr. Weiss:

We acknowledge your request to participate by filing amicus curiae briefs in the above-entitled action. This letter is to advise you that you have our consent as counsel for the plaintiff/appellee to submit amicus curiae brief on behalf of the right to a trial by jury.

We appreciate your interest in this case and we hope that a mutually satisfactory resolution can be obtained from the Supreme Court.

Smith, Patterson, Follin,
Curtis & James

By: JONATHAN R. HARKAVY

(Letterhead of Brooks, Pierce, McLendon,
Humphrey & Leonard)

July 19, 1977

Mr. Jonathan A. Weiss
Legal Services for the Elderly Poor
2095 Broadway
New York, New York 10023

Re: Lorillard v. Pons—No. 76-1346
United States Supreme Court

Dear Mr. Weiss:

Petitioner Lorillard hereby gives its written consent to the Legal Services for the Elderly Poor filing an amicus curiae brief on the merits in the above case.

Very truly yours,

THORNTON H. BROOKS
Thornton H. Brooks

THB:ptm

Supreme Court, U. S.
FILED
SEP 2 1977
MICHAEL RODAK, JR., CLERK

No. 76-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

LORILLARD, A DIVISION OF LOEW'S THEATRES, INC.,
Petitioner,

v.

FRANCES P. PONS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

INTEREST OF THE *AMICUS CURIAE*

This brief *Amicus Curiae* of the Equal Employment Advisory Council (EEAC) is submitted pursuant to the written consent of all parties.[1] EEAC is a voluntary, non-profit association, organized as a corporation under the laws of the District of Columbia. Its

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[1] Their consents have been filed with the Court Clerk.

membership includes a broad spectrum of employers from throughout the United States, including both individual employers and trade and industry associations. The principal goal of EEAC is to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Substantially all of EEAC's members or their constituents, are employers subject to the provisions of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* (ADEA or "the Act"). As such EEAC members have a direct interest in the issues presented for the Court's consideration in this case, which concern whether jury trial is available in ADEA actions seeking reinstatement and backpay.

STATEMENT OF THE CASE

Frances Pons initiated this individual action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (hereafter ADEA or "the Act"), alleging that her discharge by Lorillard was motivated by age discrimination. She sought reinstatement and backpay and demanded jury trial.[2] The district court

[2] Plaintiff's complaint also requested liquidated damages, costs and attorney fees. 549 F.2d at 951, 14 FEP Cases at 613. However, Pons had "conceded that the liquidated damages issue would not be triable to a jury" (*id.* at n. 3) and made "no argument that the other issues [would] support trial by jury." 13 FEP Cases at 444. While the case was pending in the court of appeals, plaintiff moved to amend the complaint to include a prayer for punitive damages. 549 F.2d

granted Lorrilard's motion to strike the jury demand as it found ADEA backpay, like backpay under other employment discrimination statutes, was part of the equitable remedy of reinstatement. On appeal, the Fourth Circuit reversed and held that Pons was entitled to jury trial on the backpay issue.

SUMMARY OF ARGUMENT

An analysis of the right to jury trial on the issues of reinstatement and backpay under the ADEA involves two separate inquiries. The first is whether Congress intended to provide jury trial under the ADEA. The second is whether the Seventh Amendment right to jury trial applies to ADEA actions for reinstatement and backpay.

As to the first issue, it is abundantly clear that Congress did not intend to provide jury trial under the ADEA. The statute does not mention jury trial and the legislative history does not support inferring the right in ADEA cases. Further, the carefully drawn Congressional enforcement scheme would be profoundly disturbed by providing jury trial.

The second inquiry, whether the Seventh Amendment requires jury trial of claims for reinstatement and backpay, necessitates application of the three

at 951 n. 2, 14 FEP Cases at 613 n. 2. The court of appeals remanded this motion to the district court to decide in the first instance the availability of such damages under the ADEA. *Id.* at 954 n. 7, at 615 n. 7. *See* n. 30 *infra.* Accordingly, the sole issue before the Fourth Circuit was the right to jury trial on the backpay issue. 549 F.2d at 951 n. 3, 14 FEP Cases at 613 n. 3.

pronged test of *Ross* v. *Bernhard*,[3] which inquires into the 1938 pre-merger equitable-legal dichotomy, whether the remedy sought is legal or equitable and whether a jury is able to comprehend the issue. Application of these tests to the instant case shows that the "nature of the [backpay] issue" is equitable and does not require jury trial. *Id.* For ADEA backpay claims, like backpay claims under Title VII and other employment discrimination statutes, "are, in substance, for restitution."[4] An ADEA "judgment compelling reinstatement and backpay (double if willful) makes an ADEA plaintiff whole, within the contemplation of Congress."[5] Thus, application of the second prong of the *Ross* analysis, with appropriate attention to the categorization of reinstatement and backpay as equitable remedies under other employment statutes, shows that the court below was in error. The correct conclusion was reached by the Sixth Circuit, which stated that payment of wrongfully withheld funds under the ADEA "is an integral part of the basic equitable claim for reinstatement." *Morelock* v. *NCR Corp.*, 546 F.2d 682, 689, 14 FEP Cases 65, 69 (6th Cir. 1976), *reh. denied*, (May 17, 1977), *pet. for cert. pending*, No. 77-172. Accordingly, backpay is an equitable issue and is "not suitable for trial by jury." *Id.*

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[3] 396 U.S. 531, 538 (1970).

[4] *Polstorff* v. *Fletcher*, 430 F. Supp. 592, 595, 14 FEP Cases 1638, 1640 (N.D. Ala. 1977).

[5] *Looney* v. *Commercial Union Assurance Co.*, 428 F. Supp. 533, 537, 14 FEP Cases 843, 846 (E.D. Mich. 1977) and cases there cited.

ARGUMENT

I. The Language of the ADEA and Its Legislative History Indicate That Congress Did Not Intend To Afford Jury Trial In ADEA Lawsuits.

The first step in determining whether jury trial is available in an ADEA action for reinstatement and backpay is to determine whether Congress intended such actions to be tried to juries. This requires examination of both the statutory language and the legislative history. Examination of the statutory language is simple and conclusive, as there is no provision authorizing jury trial in ADEA actions. *Hannon* v. *Continental National Bank*, 427 F. Supp. 215, 218, 14 FEP Cases 1364, 1367 (D. Col. 1977). The absence of any such express provision is consistent with the legislative history which fails to disclose any substantial support for providing jury trial under the ADEA. *Id.* The authoritative House and Senate Committee reports closely analyze the enforcement provisions of the proposed bills and nowhere so much as suggest an intent to provide jury trial. S. Rep. No. 723, 90th Cong. 1st Sess. 5-6, 9-10; H. Rep. No. 805, 90th Cong. 1st Sess., 1967 U.S. Code Cong. and Admin. News 2213, 2218, 2222-2223.[6]

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[6] In a Senate colloquy concerning whether the ADEA bill would prohibit discrimination on the basis of age between two individuals covered by the Act (e.g. 47 and 57), Senator Javits stated that the issue would be whether the sole criterion for selection between two such individuals was age and that a "jury will answer yes or no." 113 Cong. Rec. 31255 (1967). This isolated and off-hand reference, during consideration of a wholly separate issue, does not provide the predicate for reasonably contending that Congress intended to afford jury trial in ADEA actions. Rather, the absence of express statutory sanction, and of any direct discussion in the legislative

Conversely, when Congress does intend to provide jury trial in an employment discrimination statute, it does so in express and unmistakable language. Thus, although Congress has not provided for jury trial in actions alleging discrimination under Title VII (42 U.S.C. § 2000(e) *et seq.*),[7] it did provide expressly for jury trial in cases alleging criminal contempt under that Title (42 U.S.C. § 2000(h)):

> In any proceeding for criminal contempt arising under title * * * VII of this Act, the accused, upon demand therefor, shall be entitled to a trial by jury, which shall conform as near as may be to the practice in criminal cases. . . .

Similarly, in legislation authorizing civil litigation in many other contexts, Congress has provided specifically for jury trial where it desired to afford that right. For example, jury trial is provided in actions by seamen for injury or death under the Jones Act (46 U.S.C. § 688), in civil actions against the United States to recover taxes (28 U.S.C. § 2402), and in suits against federal trustees, receivers or managers (28 U.S.C. § 959(a)).[8] Thus, the absence of a provision expressly authorizing jury trial in ADEA actions is highly significant.

The Congressional decision not to provide authorization for jury trial in ADEA lawsuits is in keeping

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history, including the authoritative committee reports, indicate a conscious Congressional choice that jury trial was not to be provided. *Compare* 42 U.S.C. § 2000(h) affording jury trial for alleged criminal contempt under Title VII. See text *infra*.

[7] *See* discussion and cases *infra*, pp. 15-18.

[8] *See* generally 5 Moore's Federal Practice ¶ 38.12.

with the carefully designed remedial structure of the ADEA.[9] This Congressional design provides, as a condition precedent to any ADEA lawsuit, that the prompt non-legal methods of conciliation, conference and mediation provided in Section 7 must be given an unimpeded opportunity to resolve an age discrimination complaint. The Secretary of Labor was given the responsibility to effectuate these non-legal methods so that more time consuming legal remedies would be used infrequently as a last resort:

> It is intended that the responsibility for enforcement vested in the Secretary by section 7, be *initially and exhaustively* directed through informal methods of conciliation, conference, and persuasion and *formal methods applied only in the ultimate sense.* (emphasis added).
>
> H.R. No. 805, 90th Cong., 1st Sess., U.S. Cong. & Adm. News 2213, 2218 (1967).

Brennan v. *Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974). The Congressional scheme established the conciliation-mediation process as the "most favored method of enforcement" of the ADEA and made "private lawsuits . . . secondary to administrative remedies and suits by the Secretary of Labor." *Rogers* v. *Exxon Research & Engineering Co.*, 550 F.2d 834, 941 n. 11, 14 FEP Cases 518, 523, n. 11 (3d Cir. 1977), *pet. for cert. pending*, No. 76-1451.[10]

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[9] *See* 113 Cong. Rec. 34749 (1967) (Cong. Halpern), and n. 22, *infra*.

[10] *Accord*, S. Rep. No. 723, 90th Cong., 1st Sess. 5 (1967); *Burgett* v. *Cudahy Co.*, 361 F. Supp. 617, 621 (D. Kan. 1973); *Brennan* v. *Ace Hardware*, *supra*, 495 F.2d at 374, 7 FEP Cases at 661-662. *See* Agatstein, "The Age Discrimination in Employment Act of 1967: A Critique," 19 N.Y.L.F. 309, 319 (1973); 113 Cong. Rec. 34745 (1967) (Cong. Reid).

The timely notice required by Section 7(d)(1)[11] prior to a private suit under the ADEA invokes the Secretary's "exhaustive" efforts to settle the dispute through the preferred "concillatory and mediative action to avert litigation"[12]—"when disputes are fresh," and more easily settled.[13]

The Congressional preference for prompt conciliation, like the Congressional rejection of ADEA en-

[11] Section 7(d) (29 U.S.C. 626(d)) expressly provides:

> (d) No civil action may be commenced by any individual under this section until the individual has given the Secretary [of Labor] not less than sixty days' notice of an intent to file such action. Such notice shall be filed—
> (1) within one hundred and eighty days after the alleged unlawful practice occurred . . .

Under the statute, the giving of such notice then invokes a corresponding duty upon the Secretary of Labor:

> . . . upon receiving a notice of intent to sue, the Secretary shall promptly notify all persons named therein as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

[12] *McCrickard* v. *Acme Visible Records, Inc.*, 409 F. Supp. 341, 343, 344, 13 FEP Cases, 822, 823, 824 (W.D. Va. 1976).

[13] *Moses* v. *Falstaff Brewing Corp.*, 525 F.2d 92, 94, 11 FEP Cases 828, 830 (8th Cir. 1975). *Accord*, *Platt* v. *Burroughs Corp.*, 424 F. Supp. 1329, 1334-35, 14 FEP Cases 1057, 1060 (E.D. Pa. 1976); *McCrickard* v. *Acme Visible Records*, *supra*, 409 F. Supp. at 343, 13 FEP Cases 823.

Disputes are easier to settle initially because the parties' positions have not hardened and the backpay involved is not likely to be great. This is important as the ADEA covers employers with but 20 or more employees, and such small employers may be forced to litigate claims grown large through the passage of time.

forcement by the already over-burdened Equal Employment Opportunity Commission, was premised on the desire that age complaints be expeditiously resolved.[14] Prompt resolution of such disputes was deemed essential, as discharged older Americans and their families may face critical problems without a regular paycheck and livelihood. Congress was well aware of the burden on Title VII discriminatees because of the dilatory pace of EEOC proceedings and crowded court dockets.[15] As shown by the primacy it gave to the conciliation process, Congress did not wish to add the attendant delays of jury trial to the problems facing age discriminatees.[16]

In sum, there is neither express statutory authorization, nor any probative legislative history to indicate a Congressional desire to provide jury trial in ADEA actions. To the contrary, jury trial would be inconsistent with the Congressional concern for prompt resolution of age complaints which is evident throughout the ADEA's carefully designed remedial scheme and the legislative history of the Act.

[14] *See* 113 Cong. Rec. 31254 (1967) (Sen. Javits); Age Discrimination in Employment: Hearings on Age Discrimination Bills Before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. 141-43, 412-14 (1967); Note, Age Discrimination Act of 1967, 90 Harv. L. Rev. 380, 381 (1976); *Rogers* v. *Exxon*, *supra*, 550 F.2d at 841, 14 FEP Cases at 523.

[15] *See Rogers* v. *Exxon*, *supra*, 550 F.2d at 841, 14 FEP Cases at 524. ("Congress did not desire . . . to substantially increase the volume of litigation in the trial courts . . .").

[16] *See* Note, "*Ross* v. *Bernhard*: The Uncertain Future of the Seventh Amendment," 81 Yale L. J. 112, 123-26 (1971).

II. The Seventh Amendment Is Not Applicable To an ADEA Action For Reinstatement and Backpay.

A. *Introduction—The Controlling Principles.*

Absent Congressional intent to provide jury trials under the ADEA, the right must derive, if at all, from the Seventh Amendment, which provides that "[i]n suits at common law . . . the right of trial by jury shall be preserved." The Seventh Amendment right to jury trial arises only if a statute "creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974). Thus, the existence of the right is determined by reference to the English common law of 1791, the effective date of the amendment. *E.g., Dimick* v. *Schiedt*, 293 U.S. 474, 476 (1935); *Baltimore and Carolina Line, Inc.* v. *Redman*, 295 U.S. 654, 657 (1935).[17] To be sure, the right plainly extends "beyond the common law forms of action recognized" in 1791 [18] to subsequent statutes creating new causes of action, but only if "the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty." *Pernell* v. *Southall Realty*, 416 U.S. 363, 375 (1974).

The Seventh Amendment inquiry, therefore, turns on the "nature of the issue to be tried rather than the character of the overall action." *Ross* v. *Bernhard*, 396 U.S. 531, 538 (1970). In *Ross*, this Court established a three-pronged test for determining

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[17] *Accord, Slocum* v. *New York Life Ins. Co.*, 228 U.S. 364, 377 (1913).

[18] *Curtis* v. *Loether, supra*, 415 U.S. at 193.

whether an issue is "legal" within the meaning of the Seventh Amendment. A court must determine (1) whether a claim was legal or equitable before the 1938 merger of law and equity in the Federal Rules of Civil Procedure; (2) whether the remedy sought is legal or equitable; and (3) whether the issue is triable to a jury given the jurors' practical abilities and limitations. *Id.* Application of these principles yields the conclusion that there is no Constitutional right to jury trial in an action for reinstatement and backpay under the ADEA.

B. *The Equitable Nature of Reinstatement and Accompanying Backpay Under the ADEA.*

The Congressional purpose in enacting the ADEA was to establish federal statutory protection against an additional kind of employment discrimination, parallel to and consonant with the protections against discrimination already embodied in Title VII of the Civil Rights Act of 1964 and the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* The legislative history of the ADEA is replete with comparisons to these existing laws dealing with employment discrimination based on race, religion, national origin, sex and union activities. *See, e.g.*, 113 Cong. Rec. 34742 (90th Cong., 1st Sess.) (remarks of Rep. Steiger and Rep. Matsunaga); *id.* at 34774 (remarks of Rep. Kelly). Representative Burke underscored this parallel Congressional intent (113 Cong. Rec. 34742):

> In the last several years, significant legislation to bar employment discrimination on the basis of race, religion, color, and sex has been enacted. It is only just that we do the same against discrimination on the basis of age.

The courts have recognized this parallelism. As the Fifth Circuit stated in *Hodgson* v. *First Federal Savings & Loan Ass'n*, 455 F. 2d 818, 820, 4 FEP Cases 269, 270 (5th Cir. 1972):

> With a few minor exceptions the prohibitions of this enactment [the Age Act] are in terms identical to those of Title VII of the Civil Rights Act of 1964, except that 'age' has been substituted for 'race, color, religion, sex, or national origin.'

Accord, Morelock v. *NCR Corp.*, 546 F.2d 682, 686-87, 14 FEP Cases 65, 67 (6th Cir. 1976), *reh. denied*, (May 17, 1977); *Goger* v. *H. K. Porter Co.*, 492 F.2d 13, 15, 7 FEP Cases 71, 72 (3d Cir. 1974).[19]

Although the ADEA incorporates certain of the enforcement provisions of the Fair Labor Standards Act, its remedies for employment discrimination, like those of the other statutes mentioned, center on the equitable relief of injunctions compelling reinstatement or hiring and backpay to restore discriminatees fully to their prior status. ADEA Section 7.[20] *See*

[19] *See also Polstorff* v. *Fletcher*, 430 F. Supp. 592, 594, 14 FEP Cases 1638, 1639 (N.D. Ala. 1977):

> The purposes of Title VII and the ADEA, the discouragement of discrimination in employment, are substantially similar. The prohibitions of Title VII, contained in 42 U.S.C. § 2000e-3(a), and those of the ADEA are identical except that the former prohibits discrimination based on race, color, religion, sex, and national origin, while the latter prohibits discrimination based on age.

Accord, O'Connell v. *Ford Motor Co.*, 11 FEP Cases 1471, 1472 (E.D. Mich. 1975).

[20] Section 7 provides in pertinent part:

> (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, that liquidated damages shall be payable only in case of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this Act through informal methods of conciliation, conference, and persuasion.
>
> (c) Any aggrieved individual may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act: Provided, That the right of any individual to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such individual under this Act.

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, 10 FEP Cases 1181 (1975).

The court of appeals focused exclusively on the general "legal relief" language of Section 7 and the monetary nature of backpay.[21] It ignored the Act's

[21] As discussed below, p. 20, this Court has forcefully stated that not every "award of monetary relief must necessarily be 'legal' relief" for purposes of the Seventh Amendment.

equally explicit "equitable relief" mandate and the specifically enumerated remedies of employment injunctions and backpay for violations of the Act.[22] Nor did it consider the nature of specific remedies sought herein—reinstatement and backpay—as required by *Ross*. *See* 549 F.2d at 952-53, 14 FEP Cases at 614. *Compare Looney* v. *Commercial Union*, *supra*, 428 F. Supp. at 535 n. 4, 14 FEP Cases at 845 n. 4. Because the lower court relied on the "legal relief" language, it found inapplicable precedents under other employment discrimination statutes lacking such language, and relied instead on Title VIII of the 1968

Curtis v. *Loether*, *supra*, 415 U.S. at 196. *See also* cases cited *infra* n. 33.

Chilton v. *National Cash Register*, 370 F. Supp. 660, 7 FEP Cases 203 (S.D. Ohio 1974) is the first and leading case finding jury trial available on backpay claims. However, that decision issued before this Court's *Curtis* decision, and *Chilton's* reliance on the monetary feature of backpay is accordingly suspect. *See also Morelock* v. *NCR*, *supra*, 546 F.2d at 689 n. 17, 14 FEP Cases at 69 n. 17, wherein the Sixth Circuit criticized *Chilton* for relying on Title VIII rather than Title VII precedents. *See* discussion *infra*, pp. 18-19, and *Sant* v. *Mack Trucks, Inc.*, 424 F. Supp. 621 (N.D. Cal. 1976).

[22] *See Looney* v. *Commercial Union Assurance Cos.*, 429 F. Supp. 533, 537, 14 FEP Cases 843, 846 (E.D. Mich. 1977), which notes that all of the forms of relief specifically enumerated in the ADEA are equitable. This conclusion is supported by the ADEA legislative history, which indicates that Congress viewed backpay as equitable rather than legal relief. Thus, after discussing the structure of the ADEA, which had been "carefully drawn," Congressman Halpern noted that its remedies provided for employment injunctions and "equitable wage payments." 113 Cong. Rec. 34749 (1967). Notwithstanding the "legal relief" relief language of the ADEA, Congress plainly intended to provide the "equitable relief" of backpay under that Act, just as it had under Title VII.

Civil Rights Act (42 U.S.C. 3601 *et seq.*), which prohibits discrimination in housing, and on the fact that "unpaid minimum wages" under the FLSA are considered to be a legal damage claim in private lawsuits. *Id.*[23]

Had the court below properly applied the *Ross* analyses, it would have begun to consider "the nature of the [backpay] issue" (*Ross*, *supra*) by determining how the interrelated issues of reinstatement and backpay are treated under Title VII and other federal *employment* discrimination statutes. And it must be regarded as significant that under other federal employment discrimination statutes, these remedies repeatedly have been held to be equitable issues falling outside the "legal" boundaries of the Seventh Amendment. The following cases are illustrative of the well settled law finding backpay to be an integral element of the equitable remedy of restitution under statutes analogous to the ADEA:

> NLRA—*NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 47-49 (1937).
>
> Title VII—*E.g.*, *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802, 3 FEP Cases 653, 661 (4th Cir.), *cert. dismissed under Rule 60*, 404 U.S. 1006 (1971); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125, 2 FEP Cases 231, 233 (5th Cir. 1969); *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 308, 10 FEP Cases 239, 243 (6th Cir. 1975); *Slack* v. *Havens*, 522 F.2d 1091, 1094, 11 FEP Cases 27, 29-30 (9th Cir. 1975); *Loo* v. *Gerarge*, 374 F. Supp. 1338 (D. Ha. 1974). *See also Curtis*, *supra*, 415 U.S. at 196-97.

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[23] *See McClanahan* v. *Mathews*, 440 F.2d 320, 19 WH Cases 1051 (6th Cir. 1971).

42 U.S.C. § 1981—*E.g.*, *Smith* v. *Hampton Training School*, 360 F.2d 577, 9 FEP Cases 1092, 1094 n. 8 (4th Cir. 1966) (*en banc*); *Lynch* v. *Pan American Airways*, 475 F.2d 764 (5th Cir. 1973); *EEOC* v. *Detroit Edison*, *supra*, 515 F.2d at 309, 10 FEP Cases at 244, *Flores* v. *Local 25*, IBEW, 407 F. Supp. 218, 12 FEP Cases 185 (E.D.N.Y. 1976).

42 U.S.C. § 1983—*E.g.*, *Smith* v. *Hampton*, *supra*; *Harkless* v. *Sweeney Independent School Dist.*, 427 F.2d 319, 324, 2 FEP Cases 926, 930 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *McFerren* v. *County Bd. of Educ.*, 455 F.2d 199 (6th Cir.), *cert. denied*, 407 U.S. 934 (1972).

The rationale underlying all of these holdings is that hiring and reinstatement orders are essentially equitable remedies residing in the court's discretion, and backpay is an integral part of this equitable relief.[24]

The courts that have engaged in the required *Ross* analysis have reached the same conclusion under the ADEA. *E.g.*, *Morelock* v. *NCR*, *supra*, 546 F.2d at 689, 14 FEP Cases at 68. As the court stated in *Hannon* v. *Continental Bank*, "the purpose of an award of backpay under the ADEA is principally restitutionary."[25]

That conclusion is apt, as backpay under the ADEA, like that under Title VII, "is intended to re-

[24] The Department of Justice successfully urged the same position in *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. 592, 14 FEP Cases 1638, an ADEA suit against the Administrator of the National Aeronautics and Space Administration.

[25] 427 F. Supp. at 220, 14 FEP Cases at 1368. *Accord*, *Looney* v. *Commercial Union Assurance Cos.*, *supra*, 428 F. Supp. at 537-38, 14 FEP Cases at 847.

store the recipients to their rightful economic status absent the effects of the unlawful discrimination." *Robinson* v. *Lorillard*, *supra*, 444 F.2d at 802. The monetary relief—backpay—sought by ADEA complainants "is the equivalent of funds wrongfully withheld from them by [an employer] in the past." *Morelock*, *supra*, 546 F.2d at 689, 14 FEP Cases at 69.[26] A court order providing an employment injunction and backpay to an ADEA complainant serves to restore the pre-discrimination status quo by placing the complainant in the job position and economic condition that would have existed but for the unlawful discrimination.[27] *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. at 595, 14 FEP Cases at 1640. "[A] judgment compelling reinstatement and backpay (double if willful) makes an ADEA plaintiff whole, within the contemplation of Congress." *Looney* v. *Commercial Union*, *supra*, 528 F.Supp. at 537, 14 FEP Cases at 846. *See* n. 26 *supra*. As payment of wrongfully

[26] In a very real sense in ADEA cases, as in Title VII cases, a backpay award forces a "defendant to disgorge funds wrongfully withheld from the plaintiff." *Curtis* v. *Loether*, *supra*, 415 U.S. at 197. Without such restitution a successful ADEA complainant "would unjustly suffer a loss of earnings." *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. at 595, 14 FEP Cases at 1640.

[27] It is beyond cavil that discrimination of the sort proscribed by the ADEA and Title VII was not unlawful under the common law. Moreover, it is equally settled that injunctions compelling reinstatement or hiring under employment discrimination statutes are an equitable remedy unknown at common law and are, therefore, outside of the jury trial requirement. *See* cases cited, *supra* pp. 15-16, and *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. at 594-95, 14 FEP Cases at 1640.

withheld funds under the ADEA "is an integral part of the basic equitable claim for reinstatement . . . the issues to be tried in this case are equitable in nature . . . and not suitable for trial by jury." *Morelock*, 546 F.2d at 689, 14 FEP Cases at 69.[28]

This conclusion is not disturbed by the fact that jury trial is available in Title VIII cases and in private FLSA actions. The court of appeals' reliance on Title VIII and cases thereunder (and rejection of Title VII cases) is misplaced. Unlike the ADEA and Title VII, Title VIII is not an employment discrimination statute. Rather that title prohibits housing discrimination.[29] Consequently, relief under Title VIII does not include equitable reinstatement and backpay, and the required *Ross* analysis of the nature of these particular issues is not advanced by reliance on Title VIII cases. Moreover, Title VIII actions are at law and tried to juries because that statute expressly provides historically "legal" relief —"actual damages and not more than $1,000 punitive damages" (42 U.S.C. § 3612)—in contrast to the equitable remedies enumerated in the ADEA and at

[28] *Accord, Hannon* v. *Continental National Bank, supra*, 427 F. Supp. at 220, 14 FEP Cases at 1368; *Looney* v. *Commercial Union, supra*, 428 F. Supp. at 537, 14 FEP Cases at 847; *Polstorff* v. *Fletcher, supra*, 430 F. Supp. at 594-95, 14 FEP Cases at 1640. ("It is untenable that an action for reinstatement and lost earnings on account of unlawful discrimination should be equitable under Title VII, but legal under the ADEA").

[29] *See* 42 U.S.C. 3601 *et seq.*

issue here.[30] Accordingly, the district court was correct in eschewing reliance on Title VIII and relying instead on Title VII and employment discrimination cases construing the nature of reinstatement and backpay remedies. *See* 69 F.R.D. at 577-79, 13 FEP Cases at 445-47. *Accord, Hannon* v. *Continental Bank, supra*, 427 F. Supp. at 219-20, 14 FEP Cases at 1368; *Platt* v. *Burroughs, supra*, 424 F. Supp. at 1336-37.

The court of appeals' further contention that jury trial is available on the issue of ADEA backpay be-

[30] Also wide of the mark is any argument that jury trial is required in this case because the ADEA's general remedial language includes the phrase "such legal . . . relief as may be appropriate to effectuate the purposes" of the ADEA, which several courts have thought to encompass compensatory or punitive damages. *See e.g. Rogers* v. *Exxon Research & Engineering Co.*, 404 F. Supp. 324 (D. N.J. 1976), *rev'd and remanded*, 550 F.2d 834, 14 FEP Cases 518 (3d Cir. 1977). Such damages were not before the court below (*see* n. 2 *supra*), and are irrelevant to the required *Ross* analysis of the particular issues presented—the categorization of reinstatement and backpay. *See Looney* v. *Commercial Union, supra*, 428 F. Supp. at 535 n. 4, 14 FEP Cases at 845 n. 4. In any event, the better and majority view, as expressed in the Third Circuit's opinion in *Rogers*, is that Congress did not provide for either compensatory or punitive damages under the ADEA. *Rogers, supra*, 550 F.2d at 839-42. *Accord, Platt* v. *Burroughs, supra*, 424 F. Supp. at 1335-38, 14 FEP Cases at 1061-1063; *Fellows* v. *Medford Corp.*, 431 F. Supp. 199, 14 FEP Cases 1156 (D. Ore. 1977); *Looney* v. *Commercial Union, supra*, 428 F. Supp. at 535-37, 14 FEP Cases at 845-846; *Hannon* v. *Continental Bank, supra*, 427 F. Supp. at 217-18, 14 FEP Cases at 1365-66; *Sant* v. *Mack Trucks, Inc.*, 424 F. Supp. 621, 13 FEP Cases 854 (N.D. Cal. 1976). Accordingly, such legal damages are unavailable under the ADEA and cannot, in any event, provide the predicate for jury trial of ADEA actions for equitable reinstatement and backpay.

cause it is available in private FLSA actions for unpaid minimum wages[31] and because the ADEA incorporates certain enforcement procedures of the FLSA, is also without merit. *See* Section 7(b) *supra*, n. 20. As the *Hannon* court observed, actions under § 16(b) of the FLSA (29 U.S.C. § 216 (b)) are for damages alone and are tried to a jury whereas actions by the Secretary under § 17 (29 U.S.C. § 217) are for injunctions to restrain further unlawful wage underpayments as well to compel payment of improperly withheld monies and are tried to the court.[32] The *Hannon* court thus found ADEA actions seeking reinstatement and backpay directly analogous to actions under § 17. 427 F.Supp. at 221, 14 FEP Cases at 1369. *Accord*, *Morelock*, *supra*, 546 F.2d at 687-89, 14 FEP Cases at 68-69.

This conclusion is supported by the important observation of this Court in *Curtis* that it is wrong to assume that "any award of monetary relief must necessarily be 'legal' relief" for purposes of the Seventh Amendment. 415 U.S. at 196.[33] Although, ADEA backpay actions do seek monetary relief, they are unlike FLSA actions which merely resemble rou-

[31] *Wirtz* v. *Jones*, 340 F.2d 901, 904, 16 WH 771 (5th Cir. 1965). *McClanahan* v. *Mathews*, *supra*.

[32] As to the absence of jury trial in § 17 FLSA actions, *see e.g.*, *Sullivan* v. *Wirtz*, 359 F.2d 426, 17 WH 284 (5th Cir.), *cert. denied*, 385 U.S. 852 (1966); *Wirtz* v. *Jones*, *supra*, and cases cited in *Hannon*, 427 F. Supp. at 221, 14 FEP Cases at 1369.

[33] *Accord*, *Morelock*, *supra*, 546 F.2d at 685, 14 FEP Cases at 66; *Slack* v. *Havens*, 522 F.2d 1091, 1094, 11 FEP Cases 27, 29 (9th Cir. 1975); *Hannon*, 427 F. Supp. at 220, 14 FEP Cases at 1368.

tine common law actions for collection of a debt. *Hannon*, *supra*, 427 F.Supp. at 221, 14 FEP Cases at 1369. Rather, as shown, ADEA actions for reinstatement and backpay seek to "disgorge funds wrongfully withheld."[34] Moreover, such ADEA actions invoke "the broad powers of the Court and [are] essentially equitable in nature" and subject to the court's discretion. *Morelock*, *supra*, 546 F.2d at 689, 14 FEP Cases at 69. See § 7(b)(c) *supra*, n. 20. Thus, the unfettered equitable discretion vested in the court by Congress in Section 7 "to determine the appropriate remedies in each case for effectuating the purposes of the ADEA also makes jury trial inappropriate." *Hannon*, 427 F. Supp. at 221, 14 FEP Cases at 1369. *Accord*, *Morelock*, *loc. cit.* Any other conclusion would be anomalous, as backpay under other employment discrimination statutes such as Title VII has been held to be equitable (see cases *supra* pp. 15-16), after application of the *Ross* test, and it is untenable that the constitutional nature of this remedy can change from statute to statute. See *Polstorff* v. *Fletcher*, *supra*, 430 F. Supp. at 594, 14 FEP Cases at 1640; *Hannon*, *supra*, 427 F. Supp. at 220, 14 FEP Cases at 1368; *Morelock*, 546 F.2d at 689, 14 FEP Cases at 69.

[34] *See supra*, pp. 16-18.

CONCLUSION

For the foregoing reasons, the *Amicus Curiae* submits that the district court correctly concluded that jury trial is not available in ADEA actions seeking reinstatement and backpay, and therefore requests that the judgment of the court of appeals be reversed with directions to reinstate the order of the district court granting the motion to strike.

Respectfully submitted,

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